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In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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United States Court of Appeals, Ninth Circuit

DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent,

NATIONAL ASSOCIATION OF HOME BUILDERS; STATE OF ARIZONA; ARIZONA CHAMBER OF COMMERCE, Intervenors.

DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs-Petitioners,

v.

ROBERT B. FLOWERS, Chief of Engineers and Commander, U.S. Army Corps of Engineers., Defendant-Respondent,

CHRISTINE TODD WHITMAN, Administrator U.S. Environmental Protection Agency, Defendant-Respondent,

GALE NORTON; STEVEN WILLIAMS, Defendants-Respondents,

CONTINENTAL RESERVE II, LLC, Defendant-Intervenor/Intervenor,

HB LAND DEVELOPMENT COMPANY; STEPHEN A. OWENS, State of Arizona, ex-rel, Director Arizona Department of Environmental Quality; GROSVENOR HOLDINGS; NATIONAL ASSOCIATION OF HOME BUILDERS; HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA; SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION; SAGUARO RANCH INVESTMENTS LLC; SAGUARO RANCH DEVELOPMENT CORPORATION, Defendant-Intervenors/Intervenors.

Nos. 03-71439, 03-72894.

Argued and Submitted Nov. 1, 2004.
Filed Aug. 22, 2005.

Michael P. Senatore (argued), Michael P. Senatore, Defenders of Wildlife, Washington, D.C., Eric R. Glitzenstein, Meyer & Glitzenstein, Washington, D.C., Vera S. Kornylak, Arizona Center for Law in the Public Interest, Tucson, AZ (on the brief), for the petitioners.

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On Petition for Review of an Order of the Environmental Protection Agency. EPA No. 67-Reg. 79629, No. CV-02-01195-CKJ.

Before: REINHARDT, THOMPSON, and BERZON, Circuit Judges.

BERZON, Circuit Judge:

Under federal law, a state may take over the Clean Water Act pollution permitting program in its state from the federal Environmental Protection Agency (EPA) if it applies to do so and meets the applicable standards. This

case concerns Arizona's application to run the Clean Water Act pollution permitting program in Arizona. When deciding whether to transfer permitting authority, the Fish and Wildlife Service (FWS) issued, and the EPA relied on, a Biological Opinion premised on the proposition that the EPA lacked the authority to take into account the impact of that decision on endangered species and their habitat.

The plaintiffs in this case challenge the EPA's transfer decision, particularly its reliance on the Biological Opinion's proposition regarding the EPA's limited authority. This case thus largely boils down to consideration of one fundamental issue: Does the Endangered Species Act authorize – indeed, require – the EPA to consider the impact on endangered and threatened species and their habitat when it decides whether to transfer water pollution permitting authority to state governments? For the reasons explained below, we hold that the EPA did have the authority to consider jeopardy to listed species in making the transfer decision, and erred in determining otherwise. For that reason among others, the EPA's decision was arbitrary and capricious. Accordingly, we grant the petition and remand to the EPA.

I. Background

A. The National Pollution Discharge Elimination System (NPDES)

The Clean Water Act ("the Act"), passed in 1972, established the National Pollution Discharge Elimination ("pollution permitting") System. That System gave the EPA authority to issue permits for the discharge of pollutants into navigable waters. *See* 33 U.S.C. § 1342(a). The Act further provides that a state may apply to the EPA to administer the federal pollution permitting program

regarding waters within its borders. § 1342(b). The EPA Administrator must determine whether the state has met nine specified criteria and "shall approve" state applications that meet those criteria. *Id.*

The state transfer provisions of § 1342(b) have proven popular. Arizona was the forty-fifth state to obtain pollution permitting authority from the EPA. *See* 67 Fed.Reg. 79,629 (Dec. 30, 2002) (announcing approval of Arizona's pollution permitting authority); 65 Fed.Reg. 50,528, 50,529 (Aug. 18, 2000) (listing then-approved states).

Once the EPA transfers a permitting program to a state government, the EPA Administrator maintains an oversight role to assure that the state follows Clean Water Act standards. 33 U.S.C. § 1342(c)(2). If the Administrator determines that the state is not following those standards, the Administrator must demand corrective action. If the state does not take such action, the Administrator must withdraw approval of the state program. § 1342(c)(3).

B. The Endangered Species Act

In 1973, one year after the enactment of the Clean Water Act, Congress passed the Endangered Species Act, "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 180, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). The present case focuses on section 7 of the Endangered Species Act, 16 U.S.C. § 1536.

Section 7(a)(2) imposes substantive and procedural requirements on "each Federal agency" with regard to "any action authorized, funded, or carried out by such agency." 16 U.S.C. § 1536(a)(2). Each agency must "insure" that such actions are "not likely to jeopardize the continued existence of any endangered species or threatened

species or result in the destruction or adverse modification of [critical] habitat of such species." *Id.* Agencies must use the "best scientific and commercial data available" to make such decisions, and must do so "in consultation with and with the assistance of the Secretary [of the Interior]." *Id.*

Endangered Species Act regulations[1] describe the consultation and action requirements imposed on agencies. Section 7's requirements apply "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. An agency must determine if a proposed action "may affect" either endangered or threatened species (denominated "listed species," § 402.02) or those species' critical habitat, and, if so, must seek formal consultation with the FWS, or, for marine species, the National Marine Fisheries Service. § 402.14(a). During such consultations, the FWS issues a Biological Opinion analyzing whether the action is likely to jeopardize any listed species or its habitat. § 402.14(h). The federal agency then makes a final decision regarding whether and how to pursue the proposed action. § 402.15(a).

A Biological Opinion must include a "summary of the information on which the opinion is based," a "detailed discussion of the effects of the action on listed species or critical habitat," and "[t]he Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." § 402.14(h).

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[1] The relevant Endangered Species Act regulations were jointly issued by the FWS, Department of the Interior, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, and Department of Commerce. *See* 50 C.F.R. ch. 4.

The "effects of the action" include "direct and indirect effects . . . together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline[, which] includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area." § 402.02. "Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." *Id.*

By its terms, section 7(a)(2) applies only to "federal agenc[ies]," not to state governmental bodies. Accordingly, the EPA's pollution permitting decisions are subject to section 7(a)(2), but state pollution permitting decisions are not.

Noting that the "EPA now consults with the [FWS and National Marine Fisheries Service] under section 7 of the [Endangered Species Act] on . . . approval of State National Pollutant Discharge Elimination (NPDES) permitting programs" but recognizing that after transfer, section 7 will not apply to the state's permitting decisions, the EPA signed a Memorandum of Agreement with the FWS governing the two agencies' involvement with transferred pollution permitting programs. *See* 66 Fed.Reg. 11,202, 11,202, 11,207 (Feb. 22, 2001). Asserting that the "EPA's oversight includes consideration of the impact of permitted discharges on waters and species that depend on those waters," *id.* at 11,215, the Memorandum lists several procedures that the EPA and FWS will establish to ensure that they communicate federal endangered species concerns

to state water pollution permitting agencies.[2] *Id.* at 11,216. The Memorandum is not, however, binding on states. *Id.* at 11,206 ("[T]he MOA . . . does not impose any requirements on States."). Rather, the EPA will "*encourage* the State . . . to facilitate the involvement of permittees" in the described processes. *Id.* at 11,216 (emphasis added).

C. The EPA's approval of Arizona's pollution permitting transfer application

The State of Arizona (Arizona) applied on January 14, 2002 for transfer of pollution permitting authority regarding Arizona waterways (except those on Indian land). 67 Fed.Reg. 49,916, 49,917 (Aug. 1, 2002). Under that proposal, the Arizona Department of Environmental Quality (ADEQ) was to be responsible for issuing water pollution permits. The EPA's regional office in San Francisco determined that the transfer could affect listed species in Arizona and so initiated formal section 7 consultation with FWS. Announcing this decision, the EPA stated that "[s]ection 7(a)(2) of the [Endangered Species Act] places a statutory requirement (separate and distinct from [33 U.S.C. § 1342(b)]) for EPA to 'insure that any action authorized, funded or carried out [by EPA]' " is unlikely to jeopardize listed species or adversely modify their critical habitat, and that the EPA is therefore "required" to consult regarding the transfer decision. 67 Fed.Reg. at 49,917 (final alteration in original); *see also id.* at 49,919.[3]

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[2] We discuss these procedures in more detail in Part III(D)(2)(a), *infra*.

[3] The EPA has followed the section 7 consultation process before transferring permitting authority to states for more than a decade. Every pollution permitting transfer decision since 1993 has involved

(Continued on following page)

During the course of the consultation, FWS field office staff in Arizona expressed serious reservations about the proposed transfer. FWS staff noted that section 7 consultations regarding past pollution permits in Arizona had led to mitigating measures to protect species' critical habitat, and feared that, without such mandatory consultation, Arizona would issue permits without mitigating measures. As a result, there could be harm to certain listed species and habitat, particularly the southwestern willow flycatcher, Pima pineapple cactus, Huachuca water umbel, cactus ferruginous pygmy owl,[4] "and perhaps other species." The staff concluded "that the transfer of this program from EPA to the State causes the loss of protections

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some form of EPA consultation with FWS regarding endangered species. *See* 66 Fed.Reg. 12,791 (Feb. 28, 2001) (Maine); 63 Fed.Reg. 51,164 (Sept. 24, 1998) (Texas); 61 Fed.Reg. 65,047 (Dec. 10, 1996) (Oklahoma); 61 Fed.Reg. 47,932 (Sept. 11, 1996) (Louisiana); 60 Fed.Reg. 25,718 (May 12, 1995) (Florida); 59 Fed.Reg. 1535, 1543 (Jan. 11, 1994) (announcing 1993 approval of South Dakota's application after FWS consultation). Earlier pollution permitting transfer decisions do not appear to have been preceded by Endangered Species Act consultation. *See, e.g.*, 52 Fed.Reg. 27,578 (July 22, 1987) (Utah); 51 Fed.Reg. 44,518 (Dec. 10, 1986) (Arkansas); 49 Fed.Reg. 39,063 (Oct. 3, 1984) (Rhode Island); 47 Fed.Reg. 17,331 (Apr. 22, 1982) (New Jersey); 44 Fed.Reg. 61,452 (Oct. 25, 1979) (Alabama); 39 Fed.Reg. 26,061 (July 16, 1974) (announcing approval of applications from fifteen states in the early years of Clean Water Act operation).

[4] We note that FWS has proposed removing the pygmy owl from the list of threatened and endangered species, although the owl currently remains listed. *See* 70 Fed.Reg. 44,547 (Aug. 3, 2005). Even if the FWS eventually de-lists the pygmy owl, that would not affect our analysis of this case for two reasons. First, we focus on the agency's action based on the record before it, which includes the pygmy owl's listed status. Second, the EPA's action can affect multiple listed species in Arizona, not only the pygmy owl. While we illustrate our analysis with examples of individual listed species, including the pygmy owl, our analysis applies with equal force even if the FWS de-lists any such species.

to species resulting from the section 7 process, and the impact of this loss must be taken into account in the effects analysis in the biological opinion." In response, EPA staff opined that the EPA lacked the legal authority to base its transfer decision on these concerns, because the agency does "not have the legal authority to regulate the non-water-quality-related impacts associated with State NPDES-permitted projects that are of concern to FWS, including the authority to object to such permits based on non-water quality related impacts to listed species."

To resolve this disagreement, staff of the two agencies developed an "Interagency Elevation Document," summarizing their respective opinions. Pursuant to the Memorandum of Agreement, this document transferred authority over the Biological Opinion to the Director of FWS, the Director of the National Marine Fisheries Service, and the Deputy Assistant Administrator of Water at the EPA. *See* 66 Fed.Reg. 11,202, 11,209 (Feb. 22, 2001).

After the consultation at the national level between the EPA and FWS, the Field Supervisor of the Arizona Ecological Services Field Office of the FWS issued a Biological Opinion recommending approval of the transfer of permitting authority to Arizona. Noting the loss of section 7 consultation, the Biological Opinion recognized that, after the transfer, no federal agency would have the legal authority to consult with developers concerning the potential impact on listed species of any pollution permits. Such consultation had lead to measures protecting listed species, including the Pima pineapple cactus, razorback sucker, Gila topminnow, southwestern willow flycatcher, and cactus ferruginous pygmy owl. Although Arizona could voluntarily consult with FWS regarding pollution permits,

neither the EPA nor FWS could *require* Arizona to act on behalf of listed species.

After recognizing this impact of the transfer of permitting authority, the Biological Opinion concluded that the

> loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal [Clean Water Act] permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

The Biological Opinion goes on to conclude:

> While reviewing this above referenced approval, the FWS has spent considerable time analyzing direct and indirect effects. In the course of this analysis, our field office staff biologists have expressed concerns that the approval will result in loss of section 7 consultation-related conservation benefits. We have stated our belief that the loss of section 7 conservation benefits is an indirect effect of the authorization. Furthermore, we have stated that this loss of conservation benefits will appreciably reduce the conservation status of the cactus ferruginous pygmyowl and the Pima pineapple cactus. Notwithstanding this, our final opinion is that the loss of section 7-related conservation benefits, which would otherwise be provided by section 7 consultations, is not an indirect effect of the authorization action.
>
> In changing from a Federal permitting program to a State permitting program, the permit-related section 7 processes for consultation will no longer apply. Essentially, there will be no substantive change in the permit program, but there will be a reduction in the

> number of mechanisms available to both of our agencies to protect federally-listed species and critical habitat in Arizona. We believe that the assumption of the program by the State of Arizona will not cause development, and concur that EPA's [Clean Water Act]-mandated approval of the program has only an attenuated causal link to the reduction in Federal [Endangered Species Act] conservation responsibilities.[5]

As an alternative to this lack-of-causation analysis, the Biological Opinion stated that other federal and state laws would sufficiently protect endangered species, so that transfer of permitting authority would not likely jeopardize such species or their critical habitat. These other laws included section 9 of the Endangered Species Act, 16 U.S.C. § 1538, which outlaws "taking" an endangered species. The Biological Opinion's reliance on this statute contrasted with earlier FWS staff concerns that "section 9 does not generally apply to plant species (such as the Pima pineapple cactus) and it is not effective for extremely rare, but wide-ranging species (such as the cactus ferruginous pygmy-owl). FWS therefore does not believe that section 9 enforcement offsets the effects of approving this program."

Independently of the Biological Opinion, an official at the Arizona Game and Fish Department[6] indicated that

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[5] The just-quoted passage mentioned two species in passing in the midst of concluding that any harm to those species was not an indirect effect of the EPA's transfer decision. Elsewhere, the Biological Opinion noted the listed species in Arizona but did not specifically discuss the effect of the transfer on any of these species.

[6] The official, Bob Broscheid, whose title at the Arizona Game and Fish Department is "Project Evaluation Program Supervisor," wrote to an official at the EPA's regional office that would supervise Arizona's permitting decisions. He also carbon copied an ADEQ official. Broscheid's

(Continued on following page)

his department had "worked cooperatively with ADEQ" when reviewing past water pollution permit applications and "look[ed] forward to continuing this level of cooperation between our agencies." Noting the EPA-FWS Memorandum of Agreement, the official asserted that "[t]his agreement will serve as a guideline for EPA, FWS, and the State of Arizona to ensure that NPDES permits will not negatively impact endangered and threatened species." The EPA's response to the Game and Fish Department official's statement was: "EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the application."

FWS staff had earlier suggested the development of a formal memorandum of understanding with ADEQ or the Arizona State Lands Department, but did not mention the Game and Fish Department. No such memorandum of understanding was ever signed, and no official from either ADEQ or the State Lands Department submitted a letter similar to the Game and Fish Department letter.

The EPA approved the permitting authority transfer two days after the FWS issued the Biological Opinion, *see* 67 Fed.Reg. 79,629 (Dec. 30, 2002), noting its belief that the Biological Opinion "appropriately considered all relevant information regarding the effects of the approval." The Arizona Department of Environmental Quality (ADEQ) currently operates the program, issuing permits for water pollution. *See ADEQ: Permits, at* http://www.azdeq.gov/

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letter describes the Game and Fish Department's understanding of its role but does not purport to speak for ADEQ.

environ/water/permits/index.html (last visited July 5, 2005).

Petitioners, Defenders of Wildlife, the Center for Biological Diversity, and Craig Miller, a resident of Pima County, Arizona (collectively, Defenders) challenge the pollution permitting transfer in two lawsuits, consolidated before us. In the first, Defenders filed a petition for review of the EPA's transfer decision with this court. The petition alleges that the EPA failed adequately to consider the transfer's impact on endangered and threatened species and their habitat, and, in particular, that the EPA's reliance on the Biological Opinion violated the Endangered Species Act and was arbitrary and capricious under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A). Three other sets of parties have since intervened, supporting the transfer but taking some issue with the EPA's administrative practices and reasoning: the National Association of Home Builders and several Arizona home builders' associations (Home Builders); the Arizona Chamber of Commerce and several other business associations (Chamber); and Arizona.

Defenders also filed an Endangered Species Act and Administrative Procedure Act suit in district court in Arizona alleging, among other claims, that the Biological Opinion supporting the pollution permitting transfer does not comply with Endangered Species Act standards. The district court held that this court has exclusive jurisdiction over the Biological Opinion challenge pursuant to 33 U.S.C. § 1369(b)(1)(D), and ordered that challenge severed from other claims in the district court, transferred to this court, and consolidated with Defenders' suit challenging the EPA transfer.

II. Jurisdiction & Standing

Before proceeding to the merits, we must satisfy ourselves that we have subject-matter jurisdiction over this case and that petitioners have standing to raise their claims. *See B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999). The Chamber contends this court lacks jurisdiction to hear Defenders' challenge to the Biological Opinion, and the Home Builders maintain that Defenders do not have standing to bring this action. Neither argument is convincing.

A. Subject-Matter Jurisdiction

"[A]ny interested person" may seek judicial *review of* the EPA Administrator's pollution permitting or state transfer decisions in the circuit court in which the person resides, so long as that circuit is directly affected by the Administrator's action. 33 U.S.C. § 1369(b)(1). Section 1369(b)(1)(D) grants this court subject matter jurisdiction to review "any determination as to a State permit program submitted under section 1342(b)." The Chamber argues that § 1369(b) authorizes review only of the EPA Administrator's transfer decision, not of a Biological Opinion completed by the FWS that informs that decision.

We disagree. The Supreme Court has noted that biological opinions typically have a "virtually determinative effect" on the ultimate agency action. *Bennett v Spear*, 520 U.S. 154, 170, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); *see also id.* at 169, 117 S.Ct. 1154 (noting that a Biological Opinion "in reality . . . has a powerful coercive effect on the action agency" with the potential to "alter[] the legal regime to which the action agency is subject"). It would be anomalous to review the ultimate agency "determination"

while ignoring the reasoning contained in a biological opinion "virtually determinative" of that action.

The actual sequence of events in this instance in [sic] consistent with the Supreme Court's observations in *Bennett* regarding the impact of a biological opinion on an agency's final decision. The EPA Administrator's decision-making process before approving Arizona's permitting transfer application included section 7 consultation with FWS and the consideration of the Biological Opinion that resulted from it: The initial dispute between the EPA and FWS regarding the Biological Opinion was "elevated" to the national level, and the final Biological Opinion incorporated the results of consultation between the EPA and FWS. The final EPA decision, in turn, followed the issuance of the Biological Opinion by two days. In its unpublished Response to Comments regarding Arizona's application to assume permitting authority, released the same day as its final decision, the EPA noted that it had "considered the [biological] opinion of the FWS in proceeding with its approval action." The EPA went on to approve the Biological Opinion's conclusions, stating its determination that "FWS appropriately considered all relevant information regarding the effects of the approval action on listed species and designated and proposed critical habitat in arriving at its conclusion, including a broad range of direct and indirect effects of EPA's approval action," and declaring that "no information has been submitted which would indicate that the conclusions in FWS's biological opinion are incorrect."

The EPA, as part of the statutorily mandated consultation process, approved of and relied upon the Biological Opinion when considering Arizona's transfer application.

Evaluating the Opinion's evidentiary and analytic basis is thus integral to reviewing the EPA's final decision.[7]

We conclude that we have jurisdiction to consider the adequacy of both the section 7 consultation and the Biological Opinion that resulted from it while reviewing the EPA's final decision.

B. Standing

Petitioners who "allege [1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief" establish Article III standing. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). As Defenders' members meet this three-part test, Defenders has organizational standing to represent their interests.

Several Defenders' members reside in Arizona and photograph and observe in Arizona various named, listed species – such as the cactus ferruginous pygmy owl, Huachuca water umbel, and the other species noted in Part I.C, *supra* – and hike and camp in these species' various habitats. These members do so regularly and plan to continue doing so in the future, because, among other reasons, these activities bring them recreational, aesthetic, and spiritual fulfillment. The members' activities occur on and near land – such as the upper San Pedro River region, the Sonoran Desert near Saguaro National Park and Tortolita Mountains Park, and the Verde River region – where significant commercial and residential

[7] The EPA does not argue otherwise. Indeed, the EPA's argument in this court largely replicates the Biological Opinion's reasoning, confirming that the reasoning was a key factor in its decision.

development is taking place, development that depends on water pollution permits. The members assert, consistently with the Biological Opinion, that section 7 consultation has in the past led to mitigation measures by real estate developers in these areas and has thereby protected listed species and their habitat. They further assert that the loss of section 7 consultation would mean that developers of future projects would not engage in such mitigation measures and that listed species, and the members' interest in their activities involving them, would thereby be harmed.

The members thus "observe[] or work[] with . . . particular animal[s and plants] threatened by a federal decision," *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 566, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); allege a harm to those animals and their habitat throughout Arizona; and assert "that [they have] an aesthetic or recreational interest in a particular place, or animal, or plant species . . . impaired by a defendant's conduct." *Ecological Rights Found. v. Pac. Lumber Co.,* 230 F.3d 1141, 1147 (9th Cir. 2000) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 182-83, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)); *see also Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1109-10 (9th Cir. 2002) (holding that regular "recreation and nature appreciation" on land covered by challenged agency action established injury-in-fact). Those allegations meet the criteria for demonstrating an adequate injury in an environmental case.

The Home Builders argue that alleging harm throughout the state of Arizona cannot establish standing, because the state encompasses too large an area to permit a sufficiently specific injury-in-fact allegation. The Defenders' members who filed declarations, however, mention

specific subareas within the state where they engage in activities related to particular listed species and where development is occurring. Our cases require no greater precision. *Res. Ltd., Inc. v. Robertson,* 35 F.3d 1300, 1303 (9th Cir. 1993); *see also Kootenai Tribe,* 313 F.3d at 1110 (finding standing where party alleged harm to 58.5 million acres of land). Moreover, in light of the statewide impact of the EPA's transfer decision, alleging an injury-in-fact covering large areas within the state simply reflects the relatively broad nature of the potential harm.

The alleged injuries are fairly traceable to the EPA's pollution permitting transfer decision. As alleged by Defenders, that decision will remove water pollution permitting decisions from the significant protections provided by section 7.

Finally, the alleged injuries would be redressable by a court order vacating or mitigating the EPA's transfer decision. The protections accorded by the Endangered Species Act would then come back into operation.

Additionally, section 7(a)(2) of the Endangered Species Act contains *both* substantive and procedural requirements, and the plaintiffs in this case have alleged violations of *both* requirements. They thus have alleged, in addition to substantive noncompliance, "procedural" harms, as described in *Lujan* and subsequent cases – here, lack of adequate consultation between the EPA and the FWS, including reliance on a legally improper Biological Opinion.

Reliance on procedural harms alters a plaintiff's burden on the last two prongs of the Article III standing test. *See Lujan,* 504 U.S. at 572 n. 7, 112 S.Ct. 2130. To establish standing by alleging procedural harm, the

members must show only that they have a procedural right that, if exercised, *could* protect their concrete interests and that those interests fall within the zone of interests protected by the statute at issue. *See Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1015 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004); *Tyler v. Cuomo*, 236 F.3d 1124, 1136 (9th Cir. 2000); *Churchill County v. Babbitt*, 150 F.3d 1072, 1077 (9th Cir. 1998), *amended by* 158 F.3d 491 (9th Cir. 1998).

The members have met these procedural harm requirements. They have, first, established a reasonable probability that the challenged action will threaten their concrete interests. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir. 2003); *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 n. 6 (9th Cir. 1995). We held in *Citizens for Better Forestry* that violating the procedural requirements for forestry decisions meets that bar, as the violation lessens the likelihood that environmental considerations will be attended to in making those decisions. *Id.* at 972-75. Similarly, the use of improper section 7 consultation by reason of an inadequate biological opinion lessens the likelihood that the impact of the proposed action on listed species and their habitats will be recognized and accounted for in making the transfer decision. *See id.* at 972.

An association has standing to sue on behalf of its members who have individual standing if "the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181, 120 S.Ct. 693. The interests at stake – the protection of endangered species – plainly

relate to Defenders' mission. Nor does this lawsuit require the active involvement of individual members, as the relief sought will run equally to all of them.

Accordingly, we hold that Defenders has standing to challenge the EPA's pollution permitting transfer decision. *See Defenders of Wildlife v. Flowers*, 414 F.3d 1066 (9th Cir. 2005) (holding that Defenders has standing to challenge particular construction permits in Arizona because of "their members' interest" in species that might live where construction would occur).

III. The Merits

A. Standard of Review

Under the Endangered Species Act, each agency has an obligation to "insure" that any action it takes is "not likely to jeopardize" listed species or their critical habitats. *See* § 1536(a)(2);[8] 50 C.F.R. § 402.15(a) (requiring each

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[8] The relevant portions of section 7(a) of the Endangered Species Act provide:

> (1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.
>
> (2) Each Federal agency *shall*, in consultation with and with the assistance of the Secretary, *insure that any action authorized, funded or carried out* by such agency (hereinafter in this section referred to as an "agency action") *is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical*, unless such agency has been granted an exemption for such

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agency to determine how to proceed "in light of its section 7 obligations and the Service's biological opinion"). Defenders allege that the EPA failed to satisfy this obligation and thus acted arbitrarily and capriciously, in violation of the Administrative Procedure Act.[9] *See* 5 U.S.C. § 706(2)(A); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992) (applying § 706(2)(A) arbitrary and capricious review to § 1369(b) petition).

An agency decision will survive arbitrary and capricious review if it is

> rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute . . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42-43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (citations omitted). Agency decisions may not, of course, be inconsistent with the governing statute. 5 U.S.C. § 706(2)(A) (instructing courts to "set aside" agency

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> action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. §§ 1536(a)(1)-(2) (emphasis added).

[9] All parties agree that arbitrary and capricious review applies to Defenders' petition for review.

action "not in accordance with law"). Also, internally contradictory agency reasoning renders resulting action "arbitrary and capricious"; such actions are not "'founded on a reasoned evaluation of the relevant factors.'" *Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)); *see also Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (finding agency action "arbitrary and capricious" because it was "internally inconsistent and inadequately explained").

Defenders allege, in particular, that the EPA's reliance on the Biological Opinion was arbitrary and capricious, as the Biological Opinion is itself invalid. *See Res. Ltd.*, 35 F.3d at 1304 (holding that an action agency may not arbitrarily and capriciously rely on a flawed biological opinion); *Pyramid Lake Paiute Tribe v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (same). An agency can satisfy the arbitrary and capricious standard of review, however, even if it relies on an "admittedly weak" Biological Opinion, if there is no "information the Service did not take into account which challenges the [biological] opinion's conclusions." *Id.* at 1415 (*cited in Res. Ltd.*, 35 F.3d at 1304). The upshot is that we must consider whether the EPA, through the Biological Opinion or otherwise, considered all the relevant Endangered Species Act factors and offered an explanation for its decision that is both "plausible" and internally coherent.

Applying this test, we first examine the consistency of the EPA's reasoning. Next, we examine the Biological Opinion, including its legal conclusion regarding the effects of the transfer decision on listed species and their

habitat. We then review the other information relied on by the EPA.

B. Coherent reasoning?

As an initial matter, the EPA's approval of Arizona's transfer application cannot survive arbitrary and capricious review because the EPA relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations. Its reasoning was therefore "internally inconsistent and inadequately explained." *Gen. Chem. Corp.*, 817 F.2d at 857.

The EPA definitively stated several times during the decisionmaking process, including when announcing its final decision, that section 7 requires consultation regarding the effect of a permitting transfer on listed species. The agency so stated when announcing its Memorandum of Agreement with the FWS, *see* 66 Fed.Reg. 11,202, 11,206 (Feb. 22, 2001); when announcing that it had initiated section 7 consultation regarding Arizona's application because, pursuant to 50 C.F.R. § 402.14(a), approving that application "may affect" listed species, *see* 67 Fed.Reg. 49,916, 49,917, 49,919 (Aug. 1, 2002); when responding, in an unpublished document, to comments regarding Arizona's application (noting that "[t]here is no doubt" that the pollution permitting transfer "is an action mandating formal consultation under section 7"); and when announcing the approval of Arizona's application. *See* 67 Fed.Reg. 79,629, 79,630 (Dec. 20, 2002) (noting that section 7(a)(2) generally "requires" consultation and that the EPA consulted with FWS "under section 7(a)(2)").

Also, before deciding that consultation was necessary, the EPA first determined that transferring pollution

permitting authority to Arizona "may affect" listed species and their critical habitat. *See* 50 C.F.R. § 402.14(a) (requiring consultation when an agency determines its action "may affect" listed species or critical habitat). The EPA, in its unpublished biological evaluation, made this determination in recognition that in the absence of section 7 consultation on each permitting decision, "there will be a reduction in the number of mechanisms available to the [FWS] to protect Federally-listed species and designated critical habitat in Arizona."

Despite the lucidity and consistency of its position on the consultation point in the administrative proceedings, in litigation the EPA's lawyers have taken varying stances on the same issue. Before the Fifth Circuit, the EPA "suggest[ed]" that section 7 compelled consultation regarding pollution permitting transfers and, when necessary to protect species, allowed conditioning such transfers on formal agreements requiring states to follow section 7 procedures when issuing permits. *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998). The Fifth Circuit rejected the latter position and did not address the former. *Id.* at 298 & n. 6.

The EPA's brief in this case states that *American Forest* "supports a finding that EPA lacks" authority to protect endangered species when considering pollution permitting approvals. The same brief, however, maintains that we need not decide the question because the agency did not rely on this position in its decision in this case. At oral argument, the EPA declined to take a position as to whether it has an obligation under section 7(a)(2) to consult with FWS with regard to permitting transfer decisions – even though, during the decisionmaking process, the

agency unequivocally stated several times that it does have such an obligation.

The EPA's post-decision equivocation cannot have any impact on our consideration of the validity of the transfer decision. We must review the EPA's actions based on the "grounds . . . upon which the record discloses that its action was based." *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943); *see also Gifford Pinchot Task Force v. U.S. FWS,* 378 F.3d 1059, 1072 n. 9 (9th Cir. 2004). The record shows unequivocally that the EPA based the action under review in this case on its belief that section 7 required consultation. We must judge its reasoning taking that position into account.

Doing so, we conclude that the obligation to consult – which, under the regulations, applies only to federal agency actions that "may affect" listed species, 50 C.F.R. § 402.14(a) – and the reasons given in the Biological Opinion for concluding that the transfer decision would not have an indirect effect on endangered species cannot coexist under section 7(a)(2). The Biological Opinion reasoned that there could be no such effect, because (1) the EPA has no authority to disapprove transfer applications because of an impact on listed species, section 7(a)(2) of the Endangered Species Act notwithstanding; (2) any impact on the post-transfer protection of listed species was the result of Congress' determination that states have no consultation or mitigation obligations, not of the transfer decision; and (3) the potential future impact on listed species would be caused entirely by new private development, and the transfer decision would not cause such development. By relying on this line of reasoning after determining that it did have a consultation obligation, the EPA decided that it had to consult but had no authority to

do anything concerning the matter about which it had to consult. One would not expect that Congress would set up such a nonsensical regime. Not surprisingly, it did not.

Section 7(a)(2) makes no legal distinction between the trigger for its *requirement* that agencies consult with FWS and the trigger for its *requirement* that agencies shape their actions so as not to jeopardize endangered species.[10] Instead, in one, integrated provision, the statute provides that agencies "shall, in consultation with and with the assistance of the [FWS], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . . ." An agency's obligation to consult is thus *in aid of* its obligation to shape its own actions so as not to jeopardize listed species, not independent of it. *Both* the consultation obligation and the obligation to "insure" against jeopardizing listed species are triggered by "any action authorized, funded, or carried out by such agency," and *both* apply if such an "action" is under consideration.

This being the case, the two propositions that underlie the EPA's action – that (1) it must, under the Endangered Species Act, consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a matter of

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[10] As described above, section 7 consultation is triggered by a determination that an agency action "may affect" listed species, 50 C.F.R. § 402.14(a), and an obligation to act to mitigate harm to such species is triggered if the FWS determines that the agency action is "likely to jeopardize" listed species or "adverse[ly] modif[y]" their habitat. § 402.14(h). If an agency action *cannot* legally affect listed species – as the Biological Opinion concludes regarding the EPA's approval of Arizona's application – then the "may affect" standard is not met.

law, to take into account the impact on listed species in making the transfer decision – cannot both be true. Because the agency's decisionmaking was based on contradictory views of the same words in the same statutory provision, the ultimate decision was not the result of reasoned decisionmaking.

Additionally, the third prong of the Biological Opinion's reasoning – that it is private development, not the EPA's transfer decision, that would cause any impact on listed species – suffers from an independent lack of plausibility. Events can, of course, have more than one cause. Events can be caused by several actions in a "but-for" causal chain. If any one of the necessary actions does not take place, the ultimate event does not occur. *See, e.g., Olympic Airways v. Husain,* 540 U.S. 644, 653, 124 S.Ct. 1221, 157 L.Ed.2d 1146 (2004) ("[T]here are often multiple interrelated factual events that combine to cause any given injury."). Obviously, without private decisions to construct new developments, there will be no Clean Water Act construction permits and no impact from the issuance of such permits on listed species or their habitats. Just as obviously, without the transfer of permitting authority from the federal to the state government, developers could be required, as they were before the transfer decision, to mitigate any impact from their development on listed species. So the impact of private development will be different depending upon whether the federal or state government does the permitting. In other words, the two sets of decisions *together* – the private development decisions and the governmental transfer decision – but not either one independently, have the potential to affect listed species and their habitat. The Biological Opinion's determination to the contrary disregards the obvious cause

analysis and thus fails the reasoned decisionmaking standard.

For these reasons, the transfer decision cannot stand. We must remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute.

C. Statutory power to protect species?

Even viewed in isolation, the first explanation for the EPA's no impact conclusion – that the loss of section 7 consultation was not an effect of its transfer decision because the agency had no authority to base its transfer decision on the loss of consultation – fares no better.

Under the statutory regime, the statutory obligation is to "insure" against likely jeopardy of listed species. The two critical factors triggering this obligation are (1) that the "action" be one for which the agency can fairly be ascribed responsibility, namely, an action "authorized, funded or carried out" by the agency; and (2) that there is the requisite nexus to an impact on listed species, namely, a direct or indirect effect "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat]." 16 U.S.C. § 1536(a)(2). There are, consequently, three relevant statutory concepts governing the reach of section 7(a)(2): the nexus to any impact on listed species, the nature of the obligation to "insure" against jeopardizing listed species, and the actions covered.

1. Nexus

The case law indicates that a negative impact on listed species is the likely direct or indirect effect of an agency's action only if the agency has some control over that result. Otherwise, the requisite nexus is absent.

A seminal section 7 indirect effects case, *National Wildlife Federation v. Coleman,* 529 F.2d 359 (5th Cir. 1976), held that the Department of Transportation was responsible for development encouraged by interstate highway construction, because the Department did "control this development to the extent that [it] control[s] the placement of the highway and interchanges." *Id.* at 374. Recently, the Supreme Court in *Department of Transportation v. Public Citizen,* 541 U.S. 752, 770, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) endorsed a similar standard to that used in *National Wildlife Federation,* albeit under a different statute.

Public Citizen concerned the application of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, regulations to the U.S. Department of Transportation's (DOT) regulations governing safety rules for Mexican trucks traveling on American roads. The NEPA regulations share with the Endangered Species Act regulations a similar definition of "indirect effects." *Compare* 40 C.F.R. § 1508.8(b) ("Indirect effects . . . are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.") *with* 50 C.F.R. § 402.02 ("Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.").

The question in *Public Citizen* was whether DOT was required under NEPA to develop an environmental impact

statement with regard to the pollution caused by the entry of Mexican trucks onto United States highways under the North American Free Trade Agreement. The Court held "that where an agency has no *ability to prevent a certain effect due to its limited statutory authority over the relevant actions*, the agency cannot be considered a legally relevant 'cause' of the effect." *Pub. Citizen*, 541 U.S. at 770, 124 S.Ct. 2204 (emphasis added); *see also id.* at 767, 124 S.Ct. 2204 (analogizing "cause" inquiry for purpose of defining "indirect effects" to proximate cause inquiry in tort law).

Given the similarity in the applicable regulations, we adopt the *Public Citizen* standard for purposes of determining the likely effects of agency action under section 7(a)(2) of the Endangered Species Act. Accordingly, deciding whether the Biological Opinion followed Endangered Species Act regulations defining "indirect effects" requires us to determine whether the EPA can consider and act upon the loss of section 7 consultation benefits in deciding whether to transfer pollution permitting authority to Arizona. If so, then the EPA's transfer decision can be a cause of the loss of section 7 consultation benefits; the loss of those benefits should have been included in the Biological Opinion as an indirect effect of the potential transfer decision; and the loss of those benefits should have been considered and acted upon by the EPA.

2. "Insure that any action . . . is not likely to jeopardize the continued existence of any [listed] species"

Authority over the loss of section 7(a)(2) consultation could be grounded in either the Clean Water Act or the

Endangered Species Act. The former option is not presented here,[11] so we focus on whether the obligation in section 7(a)(2) to "insure" against jeopardizing listed species empowers the EPA to make decisions to preserve listed species and their habitat even if the Clean Water Act does not so specify. If so, then the EPA has the authority – indeed, because section 7(a)(2) speaks in mandatory terms, the duty – to deny a pollution permitting transfer application that meets Clean Water Act standards but would jeopardize protected species.

The language in section 7(a)(2) providing that each federal agency "shall . . . insure that any action authorized, funded or carried out by such agency"[12] will not jeopardize listed species or their critical habitat is addressed to each agency, without exception. Our question is: what does it require each agency to do?

The ordinary meaning of "insure" as used in this context requires agencies to take action, as dictionary definitions make clear. To "insure" is "[t]o make (a person) sure (of a thing)" and ("[t]o make certain, to secure, to guarantee (some thing, event, etc.)").[13] VII THE OXFORD

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[11] No party questioned the EPA's determination that Arizona's transfer application met the Clean Water Act factors. *Cf. Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 298 (5th Cir. 1998) ("EPA's discretion lies . . . in ensuring that those [§ 1342(b)] criteria are met.").

[12] We refer to such actions as "agency actions."

[13] This definition is consistent with those in dictionaries in print at the time Congress enacted the Endangered Species Act in 1973. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 466, 731 (2d College Ed. 1972) (defining "insure" as "same as ensure," which is defined as "to make sure or certain; guarantee; secure"). "Insure" has multiple definitions, but the alternatives are inapposite to section 7(a)(2). They include "to pledge one's credit," "to engage by pledge or contract," and "to secure the payment of a sum of

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ENGLISH DICTIONARY 1059 (2d ed. 1989) (emphasis removed). Unless an agency has the authority to take measures necessary to prevent harm to endangered species, it is impossible for that agency to "make certain" that its actions are not likely to jeopardize those species. Otherwise, agencies would be forced to choose between violating section 7's prohibition on agency actions that are likely to jeopardize listed species and acting beyond their powers to protect such species.

The Supreme Court's seminal section 7 case, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), confirms this textual interpretation:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words *affirmatively command* all federal agencies 'to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species. . . .' This language admits of no exception.

437 U.S. at 173, 98 S.Ct. 2279 (first alteration added, other alterations in original) (citation omitted).[14] An

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money in the event of loss." THE OXFORD ENGLISH DICTIONARY 1059 (2d ed. 1989).

[14] The Chamber refers to a case of this court as purportedly limiting *Hill*, *National Wildlife Federation v. Burlington Northern Railroad, Inc.*, 23 F.3d 1508 (9th Cir. 1994). This court cannot, of course, limit any holding of the Supreme Court; only the Court or, for statutory cases, Congress may do that. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

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"affirmative command" by a superior authority – here, Congress – ordinarily carries with it both the obligation and the authority to obey that command. For example, despite policy arguments in favor of continuing construction of the dam, the Court in *Hill* relied on Congress's use of "the plainest of words" and section 7's equally plain legislative history, *id.* at 194, 98 S.Ct. 2279, to hold that further construction was in "irreconcilable conflict" with section 7. *Id.* at 193, 98 S.Ct. 2279; *see also id.* at 184, 98 S.Ct. 2279 ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

Hill's analysis of the legislative history of the Endangered Species Act confirms that the authority conferred on agencies to protect listed species goes beyond that conferred by agencies' own governing statutes. *Hill* noted that earlier endangered species legislation, as well as earlier versions of the bills that became the present Endangered Species Act, included the qualifier "insofar as is practicable and consistent with [an agency's] primary purpose." *See* Pub.L. 89-669 § 1(b), 80 Stat. 926 (1966); *Hill,* 437 U.S. at 181 & n. 26, 98 S.Ct. 2279. The final version of the

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Further, *National Wildlife Federation* was not a case concerning a federal action, and therefore did not raise any section 7(a)(2) issue. Moreover *National Wildlife Federation* merely supports the obvious proposition that a preliminary injunction is an equitable remedy and a court need not grant an injunction "for every violation of law." 23 F.3d at 1512.

Finally, far from abandoning the statutory interpretation in *Hill,* the Supreme Court has since *National Wildlife Federation* relied on and quoted *Hill* in reiterating the conclusion that "Congress[ ] inten[ded] to provide comprehensive protection for endangered and threatened species." *See Babbitt v. Sweet Home Chapter,* 515 U.S. 687, 699, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995).

statute "carefully omitted [those] reservations," *id.* at 182, 98 S.Ct. 2279, and replaced them with the universal terms of section 7. The "pointed omission" of such qualifications amounted to an "explicit congressional decision to require agencies to afford *first priority* to the declared national policy of saving endangered species." *Id.* at 185, 98 S.Ct. 2279 (emphasis added); *see also id.* at 174, 98 S.Ct. 2279 ("Congress intended endangered species to be afforded the highest of priorities.") (quoted in *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1033 (9th Cir. 2005)).

Another aspect of the statute's structure and history, not directly at issue in *Hill*, bolsters the conclusion that section 7 includes an affirmative grant of authority to attend to protection of listed species within agencies' authority when they take actions covered by section 7(a)(2). Section 7(a)(1) of the Endangered Species Act directs agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed] species." 16 U.S.C. § 1536(a)(1). Section 7(a)(2), in contrast, does not refer to agencies' existing "authorities," but instead directs agencies that, when considering covered "actions," they are to proceed in a manner not likely to jeopardize listed species.

The House Report indicates that this distinction between the two sections was, as one would expect, deliberate. The Report noted the requirement of present section 7(a)(2) as imposing a "*further* require[ment]" beyond that of section 7(a)(1).[15] *See* H.R.Rep. No. 93-412, at 14 (1973),

[15] This history is consistent with the "canon of statutory interpretation which holds that terms of the same statute are not to be construed so as to be redundant." *Agredano v. Mutual of Omaha Cos.*, 75 F.3d 541, 544 (9th Cir. 1996).

reprinted in 1 CONGRESSIONAL RESEARCH SERVICE, A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 153 (1982) [hereinafter LEGISLATIVE HISTORY] (emphasis added). The contrasting language of the two sections indicates that the "further requirement" imposed by section 7(a)(2) turns on the distinction between using *existing* authority to promote conservation of species and conferring an *additional*, do-no-harm obligation – and reciprocal authority – applicable when the agency's *own* actions could cause harm to endangered species.

That Congress so provided is confirmed by Representative Dingell's statement concerning the final bill, relied upon by the Supreme Court as an authoritative statement of section 7's intent:[16] "'[T]he agencies of Government can no longer plead that they can do nothing about [harm to threatened or endangered species]. *They can, and they must. The law is clear.*'" *Hill*, 437 U.S. at 184, 98 S.Ct. 2279 (quoting 119 Cong. Rec. 42913 (1973), emphasis in *Hill*).[17]

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[16] Representative Dingell was the House manager of the Endangered Species Act. *Hill*, 437 U.S. at 183, 98 S.Ct. 2279.

[17] Another portion of Dingell's same statement was quoted in an earlier case of this court, *County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081 (9th Cir. 2003), to support the proposition that "[t]here is authority that the [Endangered Species Act] does not grant powers to federal agencies they do not otherwise have." *Id.* at 1085 (citing *Hill*, 437 U.S. at 183, 98 S.Ct. 2279). The portion of Dingell's statement quoted in *Okanogan* was also quoted in *Hill*, but it is not the Supreme Court's own language. Much more of Dingell's same statement, including the language we quote in the text, appears as well in *Hill*.

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After the Supreme Court decided *Hill* in 1978, Congress amended the Endangered Species Act, creating a narrow exception to section 7's requirements. *See* Pub.L. No. 95-632, 92 Stat. 3751 (1978). The 1978 amendment did not change section 7's substantive provisions. Instead, Congress created a process by which agencies could apply to an "Endangered Species Committee" for exemptions, § 1536(g), and specified standards by which to judge such applications, § 1536(h). The Senate Report described this exemption as a direct response to *Hill,* stating that *Hill* represented "the type of Federal action which should be eligible for review" for a section 7(g) exemption. S.Rep. No. 95-874, at 2 (1978), *reprinted in* 3 LEGISLATIVE HISTORY, at 940.

The limited exemption created by the 1978 amendments and contained in sections 7(g) and (h) has no direct application here, as the EPA did not apply for it. Its terms, however, serve to confirm that the interpretation of the "insure" requirement in *Hill* remains controlling.

Sections 7(g) and (h) focus on practical concerns, not legal constraints on agency power to protect species. To obtain an exemption, an agency must show that "there are no reasonable and prudent alternatives to the agency action," the benefits of the action "clearly outweigh the benefits of alternative course of action consistent with

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To say that "there is authority" regarding a proposition is not to state a holding of this court. There is, as we judges are well aware in our daily work, often conflicting "authority" for any proposition. *Okanogan* had no need to survey, as we do today, all the relevant authority, as it went on to decide the case before it on independent grounds. Because the *Okanogan* panel rested its opinion on other points, it did not decide the question now before us.

conserving the species or its critical habitat, and such action is in the public interest," and the action has regional or national significance. § 1536(h)(1)(A)(i)-(iii). Critically, no section 7(g) exemption may be granted until *after* consultation is completed. § 1536(g)(1); 50 C.F.R. § 402.15(c). Thus, at the time consultation occurs, all parties must operate under the assumption that all of section 7(a)(2)'s substantive requirements apply to the action agency. The net effect of the section 7(g) and (h) exemption, then, is to leave the consultation requirement in effect as it was previously; to leave in place the kinds of "agency actions" to which the section 7(a)(2) requirement applies; but to provide a set of procedures and substantive standards for limiting in some circumstances the mandate that agencies "insure" that their actions are not likely to jeopardize listed species.

That the 1978 amendments reiterated rather than retreated from *Hill's* underlying understanding of the Endangered Species Act is confirmed by the history of those amendments. The House Report summarized Congress's understanding of *Hill's* conclusion that "[t]he pointed omission of any type of qualifying language in the statute revealed congressional intent to give the *continued existence of endangered species priority over the primary missions of federal agencies.*" H.R.Rep. No. 95-1625, 10 (1978), *reprinted in* 2 LEGISLATIVE HISTORY, at 734 (emphasis added). Congress did nothing to alter this conclusion. Instead, in enacting the 1978 amendments, Congress once again refused to adopt an amendment that would have limited section 7 compliance to situations when compliance is "practicable and consistent with [agencies'] primary responsibilities." S.Rep. No. 95-874, at 58-59 (1978), 3 LEGISLATIVE HISTORY at 996-97.

Congress's rejection of this amendment underlines its continued understanding, consistent with *Hill*, that section 7(a)(2) specifies that agencies must *when acting affirmatively* refrain from jeopardizing listed species, even if the agency's governing statute does not so provide. The only exception to this rule lies in a section 7(g) exemption.

We conclude that the obligation of each agency to "insure" that its covered actions are not likely to jeopardize listed species is an obligation in addition to those created by the agencies' own governing statute. The next question we must decide is whether the EPA's transfer decision is the kind of agency action to which that obligation applies.

3. Actions "authorized, funded, or carried out" by an agency

As we interpret section 7(a)(2) in light of the case law, the Endangered Species Act confers authority and responsibility on agencies to protect listed species when the agency engages in an affirmative action that is both within its decisionmaking authority and unconstrained by earlier agency commitments. The decision to approve a state's pollution permitting transfer application meets these criteria and is thus the sort of decision to which section 7(a)(2) applies. The Biological Opinion's reasoning that the EPA had no choice but to disregard the impact of the transfer on listed species in Arizona was therefore inconsistent with the statute.

Section 7(a)(2) applies to all agency actions "authorized, funded, or carried out" by the agency in question. This language does indicate that some agency actions are not covered – those the agency does *not* "authorize[],

fund[], or carr[y] out." Our determination as to whether the transfer decision is covered thus depends on the meaning of those terms.[18]

The regulatory provision that delineates the actions covered by section 7(a)(2) reads: "Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Although there is no statutory reference to "discretionary involvement or control," there is the limitation, just noted, to actions "authorized, funded, or carried out" by the agency. As that limiting language is the only possible source for the regulation's "discretionary" qualification of "all actions," we take the regulation as a gloss on what the statutory limitation means and interpret the term "discretionary" accordingly.

Arizona and the Chamber note that the Clean Water Act specifies that the EPA "shall approve" state applications that meet certain enumerated factors. 33 U.S.C. § 1342(b). They argue that this language precludes EPA "discretion" to act on behalf of listed species, and that, applying 50 C.F.R. § 402.03, section 7 does not apply. However, "an agency cannot escape its obligation to comply with the [Endangered Species Act] merely because it is bound to comply with another statute that has consistent, complementary objectives." *Wash. Toxics,* 413 F.3d at 1032. Applying this principle, we reject, for two reasons,

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[18] Because we conclude that approving Arizona's application is an "authorizing" action, and because no party argued that the EPA's use of some other authority – such as its grant-making authority, *see* 33 U.S.C. § 1256, which helped Arizona implement the pollution permitting program – we do not decide whether any action besides the transfer decision triggered section 7(a)(2).

Arizona and the Chamber's argument that § 1342(b) of the Clean Water Act eliminates any obligation to follow section 7(a)(2) of the Endangered Species Act.

First, the EPA makes no argument that its transfer decision was not a "discretionary" one within the meaning of 50 C.F.R. § 402.03. Indeed, it could not so argue for, as we have seen, the agency recognizes that it had a duty to consult, a duty the regulations would preclude if the federal involvement in or control of the transfer decision was not sufficiently "discretionary." We may not affirm the EPA's transfer decision on grounds not relied upon by the agency. *See Chenery I,* 318 U.S. at 87, 63 S.Ct. 454; *see also Gifford Pinchot Task Force,* 378 F.3d at 1072 n. 9. Further, we ordinarily defer to an agency's interpretation of its own regulation. *See United States v. Cleveland Indians Baseball Co.,* 532 U.S. 200, 220, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001). As the EPA evidently does not regard § 402.03 as excluding the transfer decision, we should not so interpret the regulations.

Second, cases applying § 402.03 are consistent with our understanding that the regulation's reference to "discretionary . . . involvement" is congruent with the statutory reference to actions "authorized, funded, or carried out" by the agency. Put another way, imposing section 7(a)(2)'s substantive requirements in those cases would have gone beyond the limited command of the statute.

Our § 402.03 "discretionary . . . involvement or control" cases hold section 7(a)(2) inapplicable if the agency in question had "no ongoing regulatory authority" and thus was not an entity responsible for decisionmaking with respect to the particular action in question. *Wash. Toxics,*

413 F.3d at 1033. For example, we have relied on the "discretionary . . . involvement" regulation to find section 7(a)(2) inapplicable where the agency lacked any decisionmaking authority over the action of the kind challenged. *See Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy,* 383 F.3d 1082, 1092 (9th Cir. 2004) (holding that the action at issue fell outside the agency's authority because the risk of harm to listed species arose from the President's decision regarding the Navy's nuclear submarine force, not the Navy's obedience to that order); *see also Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1074 (9th Cir. 1996) (holding section 7(a)(2) inapplicable where a different agency made the ultimate decisions, while the respondent agency "merely provided advice," without authorizing, funding or carrying out anything). Other cases have found section 7(a)(2) inapplicable where the challenged action was legally foreordained by an earlier decision, such as where the agency lacked the ability to amend an already-issued permit "to address the needs of endangered or threatened species." *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.,* 255 F.3d 1073, 1082 (9th Cir. 2001) (cited in *Wash. Toxics,* 413 F.3d at 1032) (applying § 402.16, which has similar language to § 402.03); *see also Sierra Club v. Babbitt,* 65 F.3d 1502, 1509 (9th Cir. 1995) (cited in *Wash. Toxics,* 413 F.3d at 1032) (holding that section 7(a)(2) did not apply because the agency had no "[]ability to influence" a project based on a right-of-way granted prior to the Endangered Species Act's enactment).

In contrast, we have held that section 7(a)(2) does apply where the agency in question had continuing decisionmaking authority over the challenged action. *See Wash. Toxics,* 413 F.3d at 1032 (holding that section 7(a)(2) applies to the EPA's registration of pesticides because of its

"ongoing discretion to register pesticides, alter pesticide registrations, and cancel pesticide registrations"); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969 (9th Cir. 2003) (holding that section 7(a)(2) applies to the granting of permits – a quintessential "authorizing" action – for future fishing); *see also Sierra Club*, 65 F.3d at 1508 (citing *O'Neill v. United States*, 50 F.3d 677, 680-81 (9th Cir. 1995), and noting that section 7 applies to already-approved projects "if the project's implementation depended on an additional agency action"); *Envtl. Prot. Info. Ctr.*, 255 F.3d at 1082; *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (holding that section 7(a)(2) applies to "renewal of water contracts" because the agency had power to set the terms of – that is, to "authorize" – the renewed contracts, and was not bound to reaffirm merely the previously-negotiated terms); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994) (holding that section 7(a)(2) did apply when there was "ongoing agency action" in that the agency retained power to authorize and carry out land use decisions).

In sum, we understand our cases applying the "discretionary ... involvement" regulation to interpret that regulation to be coterminous with the statutory phrase limiting section 7(a)(2)'s application to those cases "authorized, funded, or carried out" by a federal agency. Where a challenged action has not been "authorized, funded, or carried out" by the defendant agency, we have held that section 7(a)(2) does not apply. Where the challenged action

comes within the agency's decisionmaking authority and remains so, it falls within section 7(a)(2)'s scope.[19]

Like the agencies in *Washington Toxics, Pacific Rivers* and *Houston* but not the other § 402.03 cases noted above, the EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application. The

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[19] The dissent concludes that because the Clean Water Act requires the EPA to consider a list of nine requirements when evaluating a state's pollution permitting transfer application, the EPA had no discretion to reject Arizona's application on Endangered Species Act grounds. The EPA has repeatedly taken the position that the question whether the EPA has sufficient discretion, applying 50 C.F.R. § 402.03, under the Endangered Species Act is not before us and has twice asked us to remand any question concerning such discretion. *See* EPA CR 28(j) letter of July 27, 2005 ("EPA did consult. The only issue before this Court is the adequacy of that consultation. For the same reason, the Court should not reach the question regarding whether the EPA has sufficient discretion to trigger consultation regarding the approval of the transfer of 402 permitting authority to the State."); EPA CR 28(j) letter of Aug. 4, 2005 ("Respondents again emphasize that the issue of whether or not the [EPA] can properly rely on 50 C.F.R. § 402.03 in deciding whether or not it must consult regarding its approval of the State of Arizona's Clean Water Act 402 Permitting Program is not before the Court in this case because EPA did consult regarding the approval of the program."). As noted in Part III.B, *supra*, the EPA has taken contradictory positions regarding its section 7(a)(2) obligations. The dissent does not explain its disagreement with that portion of our opinion.

The dissent argues that we should nonetheless affirm the EPA's action based on § 402.03 because the question is one of statutory interpretation. But that is simply not so; § 402.03 is a regulation, *not* a statute. The dissent offers no analysis of the key *statutory* provision, section 7(a)(2) of the Endangered Species Act, nor does it offer any response to our interpretation of the plain language, intent and history of that section. Although the dissent does offer an interpretation of the Clean Water Act, that interpretation only matters if we are wrong about section 7(a)(2) of the Endangered Species Act and the EPA was wrong under 50 C.F.R. § 402.03 in consulting about the transfer of permitting authority.

EPA's decision authorized the transfer, thus triggering section 7(a)(2)'s consultation and action requirements.

4. Other Circuits

Although *Washington Toxics* and the cases are fully consistent with our analysis, this case is the first in which we have specifically addressed the question whether section 7(a)(2) of the Endangered Species Act provides a modicum of additional authority to agencies, beyond that conferred by their governing statutes, to protect listed species from the impact of affirmative federal actions. Other circuits, however, have considered the question. The reasoning of those opinions reflects an existing intercircuit conflict on the question before us, with two circuits reading section 7(a)(2) as we do and two concluding that section 7 does not itself authorize agencies to protect listed species even when it is their own action that is jeopardizing then. *Compare Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1299 (8th Cir. 1989), *and Conservation Law Found. v. Andrus*, 623 F.2d 712, 715 (1st Cir. 1979) *with Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 294, 298-99 (5th Cir. 1998), *and Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992). We do not find the D.C. Circuit and Fifth Circuit cases persuasive, as they do not reflect a full consideration of the text and history of section 7(a)(2).

The First Circuit, writing a year after the Supreme Court decided *Hill*, noted that the Endangered Species Act "will continue to apply of its own force to major actions taken by the [agency]," regardless of the contents of the specific statute under which the agency acted. *Conservation Law Found.*, 623 F.2d at 715. Thus, although the

governing statute in that case may have contained standards "less stringent than those of the [Endangered Species Act]" with regard to the protection of listed species, "[t]he [Endangered Species Act] by its terms applies to all action by the Secretary." *Id.* Consequently, "[i]f [the secretary] cannot . . . insure that exploration will not jeopardize the continued existence of [listed species], he will not approve exploration plans." *Id.*

A decade later, the Eighth Circuit echoed *Conservation Law Foundation,* writing that "[e]ven though a federal agency may be acting under a different statute, that agency must still comply with the [Endangered Species Act]." *Defenders of Wildlife,* 882 F.2d at 1299; John W. Steiger, *The Consultation Provision of Section 7(a)(2) of the Endangered Species Act and Its Application to Delegable Federal Programs,* 21 ECOLOGY L.Q. 243, 274 (1994) (describing as "well established" the proposition that "section 7(a)(2) provides an independent source of authority that is in addition to the authority the Agency is granted in its programmatic statutes").

The D.C. Circuit has indicated that the Endangered Species Act does not empower an agency to impose conditions on an interim, annual license that, unlike the pollution permitting transfer decisions at issue here, the agency was obliged to issue without any deliberation. In so concluding, the D.C. Circuit noted in passing the language of section 7(a)(2), but reasoned that section 7(a)(1) instructs agencies to "utilize their authorities," and that this *section 7(a)(1)* language "does not *expand* the powers conferred on an agency by its enabling act." *Platte River,* 962 F.2d at 34 (emphasis in original).

Platte River did not recognize the obvious differences between section 7(a)(1) and 7(a)(2) in both language and purpose. The D.C. Circuit did not, for example, discuss at all the meaning of the term "insure" in section 7(a)(2), absent from section 7(a)(1). Nor did it notice the difference between affirmative agency attempts to protect listed species (section 7(a)(1)) and a do-no-harm directive pertaining to affirmative agency actions with likely adverse impact on listed species (section 7(a)(2)). Finally, the D.C. Circuit in *Platte River* did not mention the availability of exemptions from section 7(a)(2) under the 1978 amendments, or the repeated decision of Congress not to approve proposed amendments that would have limited the reach of section 7(a)(2) so as to accord with the D.C. Circuit's reading of the unamended statute. For all these reasons, we do not find *Platte River's* cursory consideration of the question persuasive.

The Fifth Circuit relied on *Platte River* to hold that section 7(a)(2) does not permit the EPA to require a state to consult with FWS before issuing a water pollution permit. *Am. Forest & Paper Ass'n,* 137 F.3d at 294, 298-99. While we do not pass on the precise question decided in *American Forest,* we do note that, aside from the deficiencies of *Platte River* on which the Fifth Circuit relied, *American Forest* rested on a fundamental misconception concerning section 7(a)(2): The Fifth Circuit stated that it is "largely beside the point" whether the EPA's transfer decision is an "agency action," because "[e]ven if EPA were required to consult with the agencies . . . EPA lacks authority to" require states to protect listed species. *Id.* at 298 n. 6. Section 7(a)(2), however, specifies that *if* an agency is contemplating a covered "agency action," it has an obligation *both* to consult and to "insure" against

taking action likely to jeopardize species. The Fifth Circuit's notion that the consultation and assurance aspects of the statute are independent is simply incorrect.

In sum, the better reasoned out-of-circuit authority, as well as our own precedent, supports our conclusion that section 7(a)(2) independently empowers EPA to make pollution permitting transfer decisions on behalf of listed species and their habitat when undertaking covered actions.

5. Summary

We hold that approving Arizona's pollution permitting transfer application was an agency action "authorized" by the EPA, thus triggering both section 7(a)(2)'s consultation requirement and its mandate that agencies not affirmatively take actions that are likely to jeopardize listed species. The EPA may have complied with its obligations under the Clean Water Act, but compliance with a "complementary" statute cannot relieve the EPA of its independent obligations under section 7(a)(2). *See Wash. Toxics,* 413 F.3d at 1033. Section 7(a)(2) imposes a duty on the EPA to "insure" its transfer decision is not likely to jeopardize protected species or adversely modify their habitat, and this duty exists alongside Clean Water Act provisions as the agency's "first priority." *Hill,* 437 U.S. at 185, 98 S.Ct. 2279.

We therefore conclude that, under *Public Citizen,* the EPA's transfer decision will cause whatever harm may flow from the loss of section 7 consultation on the many projects subject to a water pollution permit, and that harm

constitutes an indirect effect of the transfer.[20] The Biological Opinion, which ignored this effect while recognizing that section 7 consultations concerning pollution permitting permits have saved species' critical habitat in the past, was therefore deficient. The EPA erred by relying on this fatally deficient Biological Opinion.

D. Other bases for the EPA's transfer decision

Having concluded that the Biological Opinion upon which the EPA relied was flawed in its basic legal premise,[21] we now consider whether that Opinion's other analyses, or any analysis outside the Biological Opinion that the EPA relied upon, saves the validity of the EPA's transfer decision.

1. No "detailed discussion" of effects on all listed species

Consistent with its underlying legal analysis, the Biological Opinion never considered in any detail the likely real-world impact of the transfer decision on listed species in Arizona. The failure to conduct that inquiry

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[20] Defenders also challenge the Biological Opinion and the EPA for failing to analyze the "cumulative effects" of the pollution permitting transfer, as required by Endangered Species Act regulations. *See* 50 C.F.R. § 402.14(g)(3) (requiring consideration of "cumulative effects"); § 402.02 (defining "cumulative effects"). As we consider the loss of section 7 consultation benefits on future permits an "indirect effect" of the EPA's transfer decision, we need not consider Defenders' argument that the EPA and Biological Opinion should have also considered that effect as part of a "cumulative effect."

[21] *See supra*, Parts III(B)-(C).

fatally infects the Opinion's truncated alternative causation analysis.

50 C.F.R. § 402.14(h)(2) requires a biological opinion to include a "detailed discussion of the effects of the action on listed species or critical habitat." The Biological Opinion on which the EPA relies does not do so. Instead, it refers to a website summarizing listed species' *status,* but includes no discussion of how the pollution permitting transfer might affect any particular species. The Biological Opinion concludes that the transfer will not likely jeopardize *any* species – but only because, once again, "it is not the proposed action itself that is jeopardizing these species."

Defending the Biological Opinion, the Home Builders argue that the "effects of the action" – which the Biological Opinion must consider under 50 C.F.R. § 402.14(h) – exclude the impact of Arizona water pollution permits on terrestrial species.[22] Neither the Biological Opinion nor the EPA, however, used this argument to support the agency action. We may not affirm the EPA's transfer decision on grounds not relied upon by the agency. *See Chenery I,* 318 U.S. at 87, 63 S.Ct. 454; *see also Gifford Pinchot Task*

[22] The record indicates that a large portion of permits issued by ADEQ – up to 20,000 permits annually – will be for "stormwater construction [discharges]." This reference is to storm water that flows over a construction site, picking up various pollutants and carrying them across terrestrial and eventually into aquatic habitat. *Stormwater Discharges from Construction Activities,* EPA-NPDES, *at* http://cfpub1.epa.gov/npdes/stormwater/const.cfm?program-id=6 (last visited July 5, 2005). Such permits relate to the construction itself, not to a discrete discharge during construction. As a practical matter, a developer could not perform any construction activities without such a permit.

Force, 378 F.3d at 1072 n. 9. Accordingly, we need not decide the merits of the Home Builders' argument.

It is understandable that EPA has not embraced the Home Builders' analysis. According to the Home Builders, the section 7 consultations and EPA-requested mitigation undertaken in the past regarding *federal* pollution permits were improper, because the EPA took into account as indirect effects the long-run impact of development on terrestrial upland species. This argument is based on a flawed reading of Endangered Species Act regulations.

A Biological Opinion must discuss the effects of an agency action, § 402.14(h), including the action's direct effects, indirect effects, and "effects of other activities that are interrelated or interdependent with that action," meaning those actions "that are a part of a larger action and depend on the larger action." § 402.02. If a construction project cannot go forward without a water pollution permit, then the entire project is "interrelated or interdependent" with the proposed discharge and must be considered in a Biological Opinion.

The Home Builders cite a different regulation, requiring a more limited analysis. *See* § 402.12(c), (d)(2) (describing requirements of a biological assessment to include only discussion of effects on listed species and habitat in the "action area"). But that limited analysis applies to what an action agency must do *before* formal section 7 consultation begins, and does not excuse agencies from other section 7 requirements that consultation may trigger.

The Home Builders also cite cases relating to portions of development projects that "could exist independently of each other." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116 (9th Cir. 2000). Seemingly,

the Home Builders argue that, because section 7 does not require consultation or mitigation with regard to a development project truly independent of the one covered by a permit, section 7 also does not cover development projects that *are* dependent on the permit in question. On the contrary, section 7 covers development projects "interrelated or interdependent with" the discharge permitted by a permit, and therefore covers in many instances the development that will take place if construction-connected stormwater discharge is permitted.

Neither the FWS nor the EPA makes any argument that justifies the Biological Opinion's failure to analyze, in detail, the likely effect of such future development projects fostered by pollution permits on specific species. This failure is especially telling in light of the benefits of section 7 consultation regarding water pollution permits. That consultation, as the Biological Opinion noted, has led various developers to alter their development plans, preserving thousands of acres of listed species' habitat. For example, such mitigation has "maintain[ed] dispersal and movement corridors" for the pygmy owl. FWS staff had noted that the absence of section 7 consultation could harm specific species, yet the Biological Opinion did not spell out those concerns in any detail.

By not considering the transfer's specific impact on listed species – at least those as to which specific concerns had been expressed – the Biological Opinion "failed to consider an important aspect" of the transfer decision. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

2. Alternatives to section 7 consultation

The Biological Opinion notes state and federal endangered species protections that exist without section 7 consultation, including: (1) the Memorandum of Agreement between the EPA and FWS, EPA oversight over ADEQ; (2) the Endangered Species Act's anti-take provisions; and (3) Arizona state law. The EPA relies on these protections as sufficient to assure against jeopardizing listed species. None of these protections, however, are sufficient substitutes for section 7's consultation and mitigation mandates.

a. Memorandum of Agreement

The Memorandum of Agreement provides the closest substitute for the provisions of section 7. It cannot, however, replace section 7, because it does not grant the federal government any authority to require Arizona to engage in the kind of consultation and mitigation measures EPA had conducted before the transfer.

Under the Memorandum, the EPA will review ADEQ permits and identify those that "may raise issues regarding" listed species. 66 Fed.Reg. 11,202, 11,216 (Feb. 22, 2001). For projects posing a significant threat to listed species, the FWS "will work with the State . . . to reduce the detrimental effects stemming from the permit." *Id.* The FWS, however, has no statutory authority to mandate that the state revise any problematic permits, nor does the EPA. In contrast, all federal agencies have a duty, in consultation with the FWS, to ensure that their actions are not likely to jeopardize any listed species or their designated habitat. § 1536(a)(2).

The Memorandum also provides that the "EPA will use the full extent of its CWA [Clean Water Act] authority to object to a State . . . permit where EPA finds . . . that a State . . . permit is likely to jeopardize" listed species. 66 Fed.Reg. at 11,216. However, the Clean Water Act does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of all endangered species; the EPA has that authority only when one also considers the Endangered Species Act.[23] As a result, Endangered Species Act concerns raised by a permit are cognizable under the Clean Water Act only fortuitously, if at all. Unless the EPA is willing to use the authority granted by section 7 in addition to that accorded by the Clean Water Act, the EPA's ability to object to permits and thereby conserve listed species will be quite limited.

In sum, the Memorandum calls for the EPA and the FWS to *discuss* listed species matters with ADEQ, but relies on ADEQ *voluntarily* to cooperate with those federal agencies. We assume that ADEQ will consider any listed species issues raised in good faith. Nothing in the record, however, indicates that ADEQ even has authority under state law to *require* permit applicants to protect listed species. Section 7 thus provides protection for species that reliance on purely voluntary action by the state cannot supply.

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[23] Pollution permitting standards that apply to both federal permits, 33 U.S.C. § 1342(a), and state permits, § 1342(b)(1)(A), incorporate concerns for the effect of pollutants on *aquatic* species living in waterways affected by water pollution. *See, e.g.*, 33 U.S.C. § 1317(a)(1) (listing effect of toxic pollutants on "affected organisms in any waters" as a factor to consider in issuing permit). These powers do not extend to terrestrial species, nor do they include section 7(a)(2)'s *prohibition* on agency actions that are likely to jeopardize listed species.

b. EPA oversight

For similar reasons, EPA oversight under 33 U.S.C. § 1342(c) provides a weak substitute for section 7 consultation. Such oversight relates to different substantive standards – those of the Clean Water Act, rather than the Endangered Species Act. The Clean Water Act standards governing permitting decisions will not directly relate to protection of most – if any – listed species, and so cannot substitute for section 7 coverage.

c. Endangered Species Act anti-take provisions

The Endangered Species Act makes it a crime to "take" any species listed as endangered, defining "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1538(a); 16 U.S.C. § 1532(19). The Supreme Court has upheld regulations that define "take" to include any act "which actually kills or injures wildlife," where such acts may include "significant . . . modification or degradation" of listed species' habitat.[24] *See Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 691, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) (upholding 50 C.F.R. § 17.3). Section 10 of the Endangered Species Act creates an "incidental take" permit program pursuant to which the Secretary of Interior may grant permits for

[24] The regulation defines "[h]arm in the definition of 'take' in the Act [as] an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

activity – such as some construction projects – that may incidentally "take" an endangered species specimen, so long as the permittee sufficiently mitigates the risk of a take. *See* 16 U.S.C. § 1539. These anti-take provisions apply to all actors, not only the federal government. § 1538(a)(1). Accordingly, private developers are subject to sections 9 and 10 regardless of whether the EPA or a state government issues the developers' water pollution permits.

Sections 9 and 10 are important provisions, but they are not substitutes for section 7 coverage. Section 7 covers *any* federal agency action that could *threaten* species or their critical habitat. While the anti-take provisions prohibit "[e]liminating a threatened species' habitat," *Envtl. Prot. Info. Ctr.*, 255 F.3d at 1075, or "significant . . . modification or degradation where it actually kills or injures wildlife," 50 C.F.R. § 17.3, the effectiveness of these prohibitions depends on their enforcement by the appropriate authorities. "[T]he Government cannot enforce the § 9 prohibition until an animal has actually been killed or injured." *Sweet Home,* 515 U.S. at 703, 115 S.Ct. 2407. Accordingly, after-the-fact enforcement cannot prevent threats to listed species the way section 7 can. Prevention of takings may come from the section 10 permitting process, but private parties *choose* whether to pursue a section 10 incidental take permit. *Defenders of Wildlife v. Bernal,* 204 F.3d 920, 927 (9th Cir. 2000). Private parties only have an incentive to do so if there is a meaningful threat of section 9 enforcement.

On this record, there is no indication that section 9 is or will be enforced meaningfully enough to provide a sufficient substitute for section 7. The record reflects no instances in which FWS has initiated a section 9 enforcement action with regard to listed species in Arizona.

Additionally, FWS staff stated in the Interagency Elevation Document that they did "not believe that section 9 enforcement is an acceptable substitute for section 7 consultation." This opinion reflected staff concerns, expressed in internal emails, that section 9 is ill-suited to protect species such as the pygmy owl, whose numbers are so low that section 9 enforcement may come too late to prevent extinction. The Biological Opinion contains no indication the FWS will increase section 9 enforcement nor any other analysis alleviating FWS staff concerns. The absence of record evidence of section 9 enforcement is confirmed by our own research, which reveals public notices regarding only two applications for incidental take permits for projects occurring in Arizona since January 1, 2001. *See* 69 Fed.Reg. 75,556 (Dec. 17, 2004); 69 Fed.Reg. 15,362 (Mar. 25, 2004). Compared to the large number of construction projects in the state, this low number suggests that developers do not feel that section 9 enforcement is sufficiently likely for them to apply for section 10 permits.

d. Arizona state law

The Biological Opinion notes one Arizona law that prohibits the taking of "native plants" – which, the Opinion notes, includes endangered or threatened plants – from any land within the state without following certain procedures. *See* Ariz.Rev.Stat. § 3-904. The Opinion implies that this law partially fills a gap left open by the Endangered Species Act, which limits the taking of endangered plants on federal land only, not all land. *See* 16 U.S.C. § 1538(a)(2)(B).

The Arizona statute, however, is not an adequate substitute for section 7(a)(2)'s limitation on granting permits that could jeopardize listed species. As the Biological Opinion notes, the Arizona statute merely requires private landowners to notify a state agency of plans to destroy certain plants on their property and regulates when that destruction may take place. *See* Ariz.Rev.Stat. § 3-904. It does not prohibit such destruction, or set standards to be taken into account in the issuance of water pollution permits. The Biological Opinion does not discuss the standards that govern Arizona's regulation of native plant takes, and does not indicate that Arizona considers the listed status of plants for federal purposes in granting native plant take permits.

In sum, the Biological Opinion fails to provide a reasoned explanation concerning why Arizona's native plant law adequately substitutes for section 7, even for plants. As it obviously does not do so for animals, § 3-904 is no substitute for section 7(a)(2) of the Endangered Species Act.

3. The EPA's reliance on the Biological Opinion

The EPA had an independent duty under section 7(a)(2) to ensure that its pollution permitting transfer decision was not likely to jeopardize listed species or adversely modify their habitat. Arbitrarily and capriciously relying on a faulty Biological Opinion violates this duty. *Res. Ltd.*, 35 F.3d at 1304; *Pyramid Lake,* 898 F.2d at 1415.

When considering challenges to agency actions based on *factual* objections to the Biological Opinion, however, we have held that an agency can satisfy the arbitrary and

capricious standard of review even if it relies on an "admittedly weak" Biological Opinion, if there is no "information the Service did not take into account which challenges the [biological] opinion's conclusions." *Id.; see also Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984). This holding is based on the notion that action agencies should be able to rely on the expert judgments that underlie most Biological Opinions. *See id.* (twice noting reasonableness of action agency's reliance on "the *expert* agency") (emphasis added). Here, however, the Biological Opinion's flaws are *legal* in nature. Discerning them requires no technical or scientific expertise. The EPA should have understood the legal errors of the Biological Opinion's analysis. Its failure to do so led to an action based on reasoning "not in accordance with law" and is thus arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A).

Even applying the *Pyramid Lake* standard, the EPA acted arbitrarily and capriciously. Information not considered by the Biological Opinion that challenges its conclusion includes FWS staff members' articulated, specific concerns about the impact of the loss of section 7 consultation, supported by information regarding the effect of past section 7 consultations.

The EPA notes that it relied on two pieces of evidence supporting its conclusion *beyond* that contained in the Biological Opinion and argues that consideration of this evidence provided the reasoned consideration that the arbitrary and capricious standard requires.[25]

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[25] Any explanation for its decision based on facts or reasoning not in the Biological Opinion must, of course, satisfy the EPA's substantive

(Continued on following page)

The first such evidence is the EPA's own Biological Evaluation. This report focused largely on Clean Water Act requirements and devoted only a few pages to endangered species. The report summarizes the EPA-FWS Memorandum of Agreement, Endangered Species Act anti-take provisions, EPA oversight of ADEQ's permit program, and Arizona's native plant laws, without addressing their limitations, discussed above. The report's "Discussion of Effects" notes the loss of section 7 consultation, but otherwise focuses on Clean Water Act compliance and repeats the protections afforded by other programs. It does not discuss the impact on listed species of the loss of section 7 consultation and mitigation and so adds nothing to the Biological Opinion.

The second piece of evidence on which the EPA relies is an "assurance[] from the Arizona Game and Fish Department . . . that Federally-listed species would not suffer" from the lack of section 7 consultations. This document is from an Arizona official of a state department that is *not* the one that will issue Clean Water Act permits. He writes that the EPA-FWS Memorandum of Agreement "will serve as a guideline for . . . Arizona to ensure that [pollution] permits will not negatively impact endangered and threatened species."

There is no indication that Arizona would be bound by this letter. The ADEQ, the agency primarily responsible for implementing Arizona's pollution permitting authority, has not subscribed to its assurances. Nor does the letter writer explain by what authority Arizona will "ensure that

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obligations under section 7(a)(2) and the arbitrary and capricious standard of review discussed above.

. . . permits will not negatively impact endangered and threatened species," or indicate that his agency has any authority to do so, let alone authority as broad as the protections mandated by the Endangered Species Act as applied by the EPA.

In the abstract, voluntary compliance by state agencies willing to follow FWS recommendations to the same extent as would the EPA *might* substitute for section 7 coverage. The EPA, however, could not so conclude without first analyzing the likelihood that *all* relevant Arizona agencies can and would live up to the Game and Fish Department's promises, as well as considering the effectiveness of federal oversight if Arizona agencies fail to live up to any such promises.

Given its serious faults, the independent evidence on which EPA relies cannot fill in the crucial gaps in the Biological Opinion. Neither the Biological Opinion nor the EPA, consequently, adequately considered indirect effects of the transfer. The EPA thus "entirely failed to consider an important aspect of the problem." *State Farm,* 463 U.S. at 43, 103 S.Ct. 2856. Because neither the Biological Opinion nor the EPA examined all relevant data, the EPA's transfer decision was arbitrary and capricious.

4. Summary

The EPA's most serious errors were (1) its failure to understand its own authority under section 7(a)(2) to act on behalf of listed species and their habitat and (2) its failure to discuss the specific effects of its decision on the various listed species present in Arizona. It is possible that some combination of state and federal protections for listed species and state agency cooperation with the

federal Memorandum of Agreement might sufficiently replace the benefits of section 7 consultation so that no harm to listed species would be "reasonably certain to occur" as a result of losing section 7 consultation. 50 C.F.R. § 402.02. But the EPA could not so conclude without specifically analyzing each listed species within Arizona and without more certain assurances of voluntary state cooperation from officials at *all* relevant Arizona agencies, as well as a more careful consideration of the actual protection accorded by other federal and state statutory provisions and the Memorandum of Agreement.

IV. Remedy

Typically, when an agency violates the Administrative Procedure Act and the Endangered Species Act, we vacate the agency's action and remand to the agency to act in compliance with its statutory obligations. In certain instances, however, "when equity demands, the [challenged action] can be left in place while the agency follows the necessary procedures." *Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1405 (9th Cir. 1995).

We have carefully considered whether equitable considerations warrant allowing Arizona to maintain its authority over pollution permitting decisions while the EPA "follows the necessary procedures," beginning with consultations with the FWS based on legal understandings consistent with this opinion. Arizona has undoubtedly expended significant funds to obtain and implement pollution permitting authority and granted a significant

number of permits pursuant to this authority.[26] We cannot reverse the expenditure of those funds nor the issuance of those permits. We further recognize the administrative difficulties in transferring a program like pollution permitting from Arizona back to the EPA and very possibly back to Arizona again. Based on the desire of Arizona to keep its pollution permitting authority and the record of other states obtaining and maintaining their own pollution permitting authority, even after full consultation regarding the transfer's effect on endangered and threatened species, *see supra* note 3, it seems likely that Arizona will again apply for pollution permitting authority. Finally, we note that all of the actors in this case – Arizona, the EPA, and FWS – operated in a somewhat murky legal environment. Faced with two circuit court cases suggesting that the EPA lacked authority to make pollution permitting transfer decisions based on Endangered Species Act concerns, "the extent of doubt whether the agency chose correctly" was not insignificant. *Sugar Cane Growers Coop. v. Veneman,* 289 F.3d 89, 98 (D.C. Cir. 2002).

Other factors, however, weigh heavily in favor of vacating the EPA's approval of Arizona's transfer application. As noted above, Arizona annually issues tens of thousands of pollution permits pursuant to the EPA's action. *See supra* note 22. We have concluded that, absent section 7 coverage, we have no strong assurances that

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[26] For instance, one type of water pollution permit issued by Arizona under its pollution permitting authority, stormwater discharge permits, account for approximately 20,000 permit applications annually. ARIZ. DEP'T OF ENVT'L QUALITY, *ADEQ Director Steve Owens Unveils a Web-based System to Apply for Stormwater Discharge Permits, at* http://www.azdeq.gov/function/news/2003/june.html# 609 (last visited July 5, 2005).

these permits will not allow development projects that are likely to jeopardize listed species or adversely modify their habitat. The purpose of the Endangered Species Act – to conserve endangered and threatened species rather than allow them to go extinct, *see* 16 U.S.C. § 1531 – renders the risk of harm to listed species too great. This is particularly true in this case, in which the record suggests that one species – the pygmy owl – numbers less than 100. Temporary harms while the agency "follow[ed] the necessary procedures," *Idaho Farm Bureau,* 58 F.3d at 1405, could lead to the permanent harm of extinction. *See id.* (noting "the potential extinction of an animal species" as a crucial factor to consider when determining whether a challenged agency action should be vacated). Our concern with the risk of extinction comports with our understanding of the Endangered Species Act's "institutionalized caution mandate." *Wash. Toxics,* 413 F.3d at 1030 (quoting *Sierra Club,* 816 F.2d at 1389). Without greater assurances that harm to listed species would not occur, our "institutionalized caution" makes us unwilling on the present record to order any remedy other than vacation of the EPA's approval of Arizona's transfer application.

For the just-stated reasons, we vacate the EPA's decision to approve Arizona's pollution permitting application. Pursuant to 28 U.S.C. § 1631, we transfer Defenders' Endangered Species Act and Administrative Procedure Act suit challenging the validity of the Biological Opinion to the district court where it was originally filed for proceedings consistent with this opinion. The petition for review is GRANTED and REMANDED to the EPA for proceedings consistent with this opinion.

THOMPSON, Senior Circuit Judge, dissenting:

Because I disagree with the conclusion in Part III of the majority opinion that the EPA had the authority to consider the impact on endangered and threatened species in making its decision to transfer administration of the pollution permitting system to the State of Arizona, I respectfully dissent.

As the majority observes, the requirements of section 7 of the Endangered Species Act "apply to all [agency] actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. "Where there is no agency discretion to act, the [Endangered Species Act] does not apply." *Natural Res. Def. Council v. Houston,* 146 F.3d 1118, 1125-26 (9th Cir. 1998). We have previously held that an agency lacks the requisite discretion to act when the agency does not have the authority to take action on behalf of endangered or threatened species. *Ground Zero Ctr. for Non-Violent Action v. United States Dep't of the Navy,* 383 F.3d 1082, 1092 (9th Cir. 2004) (where agency lacks discretion, to require compliance with section 7 of the Endangered Species Act "would be an exercise in futility"); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.,* 340 F.3d 969, 974 (9th Cir. 2003) ("[T]he discretionary control retained by the federal agency must have the ability to inure to the benefit of a protected species. If no discretion to act is retained, then consultation would be a meaningless exercise.") (internal citation omitted); *Sierra Club v. Babbitt,* 65 F.3d 1502, 1509 (9th Cir. 1995) ("[W]here . . . the federal agency lacks the discretion to influence the . . . action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species.").

The majority interprets the "discretionary involvement" language of 50 C.F.R. § 402.03 to be "coterminous with" all actions "authorized, funded, or carried out" by a federal agency. Stated differently, the majority now holds that *any* action which comes within a federal agency's decisionmaking authority falls within the scope of section 7(a)(2) of the Endangered Species Act. In my view, our cases do not take such an expansive view of the meaning of § 402.03. Rather, we have consistently recognized that an agency may have decisionmaking authority and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered or threatened species. *See Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1074-75 (9th Cir. 1996) (federal agency's decision to consult with and to provide advice to private entity was not discretionary agency action triggering section 7); *Sierra Club v. Babbitt,* 65 F.3d at 1508-1510 (holding that although the Bureau of Land Management retained the right to object to a road development project in three specified circumstances, "the agency simply [did] not possess the ability to implement measures that inure to the benefit of the protected species."); *cf. Turtle Island Restoration Network,* 340 F.3d at 975 (concluding that Congress' decision to use the words "'including but not limited to'" in the statute granting the Fisheries Service the authority to issue fishing permits "contemplated that the list of potential obligations that the United States had under the Agreement was not exhausted by those listed in the subsection").

Here, the EPA did not have discretion to deny transfer of the pollution permitting program to the State of Arizona; therefore its decision was not "agency action" within the meaning of section 7 of the Endangered Species Act.[1] The Clean Water Act, by its very terms, permits the EPA to consider only the nine specified factors. If a state's proposed permitting program meets the enumerated requirements, the EPA administrator "shall approve" the program. 33 U.S.C. § 1342(b). This Congressional directive does not permit the EPA to impose additional conditions. Although the majority quite properly concludes that a federal agency cannot escape its obligation to comply with section 7 of the Endangered Species Act when it is "bound to comply with another statute that has consistent, complementary objectives," *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005), here, the EPA has an obligation

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[1] The majority concludes that pursuant to *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943) (*Chenery I*), it may not deny the petition for review on this basis because the EPA did not contend that it lacked discretion to consult under section 7 in conjunction with the transfer of pollution permitting authority to Arizona. We have, however, previously declined to take such a broad view of *Chenery* and instead have observed that although "[g]enerally, a reviewing court may only judge the propriety of an agency's decision on the grounds invoked by the agency, . . . the court is not so bound when, as here, the issue in dispute is the interpretation of a federal statute." *Ry. Executives' Ass'n v. ICC*, 784 F.2d 959, 969 (9th Cir. 1986). The majority's conclusion further disregards our obligation to review an agency's statutory mandate de novo, *see Portland Adventist Med. Ctr. v. Thompson*, 399 F.3d 1091, 1095 (9th Cir. 2005); *see also Am. Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000) (noting that review of "substantive issues of statutory construction" "proceed[s] along [a] different analytic path [ ]" and is "subject to [a] separate standard[ ] of review" than review of an agency's compliance with procedural requirements), and, in doing so, to "give effect to the unambiguously expressed intent of Congress." *Chevron v. Nat'l Res. Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

to evaluate the state's application against nine *exclusive* requirements. 33 U.S.C. § 1342(b); *see also Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) ("The language of [§ 1342(b)] is firm: . . . 'Unless the Administrator of EPA determines that the proposed state program does not meet [the specified] requirements, he must approve the proposal.'") (quoting *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1285 (5th Cir. 1977)); *Nat'l Res. Defense Council v. EPA*, 859 F.2d 156, 173-74 (D.C. Cir. 1988) (observing that "[t]he [Clean Water Act] specifies prerequisites for state assumption of the program . . . and commands the Administrator to approve the state permit system once he determines that the statutory requirements and administrative guidelines are met."). To impose the additional requirement of consultation under section 7 would be inconsistent both with the EPA's statutory obligation to consider only the requirements enumerated in § 1342(b) and with the Clean Water Act's clearly expressed objectives. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and "that the States will manage . . . and implement" the NPDES pollution permitting program).

Nor, in my view, does the EPA possess the kind of continuing authority to monitor states' administration of their pollution permitting programs that would render its oversight discretionary. As the majority notes, the EPA's limited oversight under 33 U.S.C. § 1342(c) relates only to the substantive standards of the Clean Water Act and does not grant any additional continuing review authority that would permit meaningful section 7 consultation.

The EPA's authority to grant or to deny the State of Arizona's application to administer the pollution permitting program was nondiscretionary; I would deny the petition for review.

67 Fed. Reg. 79629 (Dec. 30, 2002)

ENVIRONMENTAL PROTECTION AGENCY

FRL-7432-2]

State Program Requirements; Approval of Application by Arizona To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Arizona

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: On December 5, 2002, the Regional Administrator for the Environmental Protection Agency, Region IX (EPA), approved the application by the State of Arizona to administer and enforce the Arizona Pollutant Discharge Elimination System (AZPDES) Program, for all areas within the State, other than Indian country. The authority to approve State programs is provided to EPA in section 402(b) of the Clean Water Act (CWA). The State will administer the approved program through the Arizona Department of Environmental Quality (ADEQ), subject to continuing EPA oversight and enforcement authority, in place of the National Pollutant Discharge Elimination System (NPDES) program previously administered by EPA in Arizona. The program is a partial program to the extent described in the section of this Notice entitled National Pollutant Discharge Elimination System (NPDES) program "Scope of the AZPDES Program." In making its decision, EPA considered and addressed all comments and issues raised during the public comment period.

DATES: Pursuant to 40 CFR 123.61(c), the AZPDES program was approved and became effective on December 5, 2002.

FOR FURTHER INFORMATION CONTACT: Matthew Mitchell, USEPA Region IX (WTR-5), 75 Hawthorne Street, San Francisco, CA, 94105, (415) 972-3508 or Chris Varga, Federal Permits Unit, Arizona Department of Environmental Quality, 1110 W. Washington St., Phoenix, AZ, 85007, (602) 771-4665. Part of the State's program submission and supporting documentation is available electronically at the following Internet address: http://www.adeq.state.az.us/environ/water/permits/federal.html

SUPPLEMENTARY INFORMATION: Arizona's application was described in the **Federal Register** (67 FR 49916) on August 1, 2002, in which EPA requested comments. Notice of Arizona's application was published in the Arizona Republic on August 13, 2002. A public hearing on the application was held on September 4, 2002, in Phoenix, AZ.

Section 402(c)(1) of the CWA provides that ninety days after a State has submitted an application to administer the NPDES program, EPA's authority to issue such permits is suspended unless EPA disapproves or approves the State's application. 40 CFR 123.21(b)(1). This ninety day statutory review period ended on October 8, 2002. However, because of the many complex issues that were raised with respect to the State's program and the need to address them in a comprehensive manner, EPA was unable to make a final decision by October 8, 2002. Thus, EPA suspended issuance of NPDES permits in Arizona on October 8, 2002. However, failure to make a decision by the October 8, 2002 deadline did not mean that the State

automatically gained NPDES authority. It is EPA's interpretation that a State agency does not gain NPDES authority unless and until EPA approves the State program, consistent with CWA section 402(b) and 40 CFR 123.1. As of December 5, 2002, the ADEQ is now authorized to issue AZPDES permits under the CWA in all areas within the State, except for in Indian country.

A. Scope of the AZPDES Program

The AZPDES program is a partial program which conforms to the requirements of section 402(n)(3) of the CWA. Specifically, Arizona is being approved to administer both the NPDES permit program covering point source dischargers to State waters and the pretreatment program covering industrial sources discharging to publicly owned treatment works.

Pursuant to CWA section 402(d), in specified circumstances EPA retains the right to object to AZPDES permits proposed by ADEQ, and if the objections are not resolved, to issue the permits itself. EPA also will retain jurisdiction over all NPDES permits it has issued in Arizona until ADEQ reissues them as AZPDES permits. Finally, EPA and State have agreed that EPA may retain permitting authority in certain limited circumstances, as set forth in the Memorandum of Agreement between EPA and ADEQ.

As part of operating the approved program, ADEQ generally will have the lead responsibility for enforcement. However, EPA will retains [sic] its full statutory enforcement authorities under CWA sections 308, 309, 402(i) and 504. Thus, EPA may continue to bring federal enforcement action under the CWA in response to any violation of the CWA, as appropriate. In particular, if EPA determines that

the State has not taken timely and/or appropriate enforcement action against a violator in Arizona, EPA may take its own enforcement action.

B. Public Comments

The EPA received numerous public comments concerning the Arizona program.

Several commenters urged the EPA to approve the State's program. The EPA agrees that the State program should be approved at this time outside Indian country.

Several commenters were concerned about impacts on endangered species and historic properties associated with EPA's approval of the AZPDES program. In addition, a few commenters urged that the EPA reject Arizona's program application on a variety of grounds.

All public comments are addressed in EPA's Response to Comments Document, dated December 5, 2002. In addition, EPA actions taken in accordance with the requirements of the Endangered Species Act and the National Historic Preservation Act are described below in Section C.

C. Other Federal Statutes

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1536(a)(2), requires that federal agencies ensure, in consultation with the United States Fish & Wildlife Service (FWS) that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed threatened or endangered species (listed

species) or result in the destruction or adverse modification of critical habitat designated for such listed species.

EPA consulted with the FWS under section 7(a)(2) of the ESA regarding the effects of the AZPDES program approval on listed species and designated critical habitat. On December 3, 2002, the Service issued a biological opinion concluding that EPA's approval of Arizona's NPDES-application is not likely to jeopardize the continued existence of listed threatened or endangered species or result in the destruction or adverse modification of their critical habitat. In the opinion, the FWS also stated that it does not anticipate that EPA's action will result in the incidental take of listed species. Issuance of the biological opinion with these findings concludes the consultation process required by ESA section 7(a)(2) and reflects the Service's agreement with EPA that the approval of the State program meets the substantive requirements of the ESA.

National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470(f), requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. Under the ACHP's regulations (36 CFR part 800), the Agency consults with the appropriate State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer on federal undertakings that have the potential to affect historic properties listed or eligible for listing in the National Register of Historic Places. During EPA's review of the Arizona

NPDES application, EPA engaged in discussions with the Arizona SHPO regarding EPA's determination that approval of the State permitting program would have no effect on historic properties.

On August 23, 2002, EPA provided the Arizona SHPO's Office with EPA's determination that approval of Arizona's application would have no effect on historic properties in Arizona. As part of the coordination process, the SHPO's Office raised certain issues regarding approval of the Arizona program for further discussions. By letter dated September 23, 2002, the SHPO withdrew these issues for consideration and informed EPA that it was working with ADEQ to coordinate its activities in the protection of Arizona's cultural resources. On October 18, 2002, the SHPO and ADEQ entered into a Memorandum of Understanding (MOU) assuring the SHPO that it would receive notices of certain proposed permit actions. This MOU further provides for coordination between ADEQ and the SHPO to resolve any identified issues to ensure that AZPDES permits will comply with Arizona water quality standards and Arizona laws protecting historic properties. For those permits with the potential to adversely affect historic properties, ADEQ and the SHPO agreed to seek ways to avoid, minimize or mitigate any adverse effects to historic properties stemming from the proposed permit. EPA believes that the agreement between ADEQ and the SHPO is consistent with EPA's determination that approval of the State permitting program would have no effect on historic properties.

Regulatory Flexibility Act

Based on General Counsel Opinion 78-7 (April 18, 1978), EPA has long considered a determination to approve or deny a State NPDES program submission to constitute an adjudication because an "approval," within the meaning of the APA, constitutes a "license," which, in turn, is the product of an "adjudication." For this reason, the statutes and Executive Orders that apply to rulemaking action are not applicable here. Among these are provisions of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* Under the RFA, whenever a Federal agency proposes or promulgates a rule under section 553 of the Administrative Procedure Act (APA), after being required by that section or any other law to publish a general notice of proposed rulemaking, the Agency must prepare a regulatory flexibility analysis for the rule, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. If the Agency does not certify the rule, the regulatory flexibility analysis must describe and assess the impact of a rule on small entities affected by the rule. Even if the NPDES program approval were a rule subject to the RFA, the Agency would certify that approval of the State's proposed AZPDES program would not have a significant economic impact on a substantial number of small entities. EPA's action to approve an NPDES program merely recognizes that the necessary elements of an NPDES program have already been enacted as a matter of State law; it would, therefore, impose no additional obligations upon those subject to the State's program. Accordingly, the Regional Administrator would certify that this program, even if a rule, would not have a significant economic impact on a substantial number of small entities.

E. Notice of Decision

I hereby provide public notice that EPA has taken final action authorizing Arizona to implement the NPDES program in all areas of the State except for Indian Country.

Authority: This action is taken under the authority of section 402 of the Clean Water Act as amended, 42 U.S.C. 1342.

Dated: December 5, 2002.

Wayne Nastri,

Regional Administrator, Region IX.

[FR Doc. 02-32907 Filed 12-27-02; 8:45 am]

United States Department of the Interior
[SEAL] **U.S. Fish and Wildlife Service** [LOGO]
Arizona Ecological Services Field Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951
Telephone: (602) 242-0210 Fax: (602) 242-2513

In Reply Refer to:
02-21-02-F-0268 December 3, 2002

E-Mail Transmission

Mr. Terry Oda
Clean Water Act Standards and Permits Office (WTR-5)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

Dear Mr. Oda:

This letter constitutes the U.S. Fish and Wildlife Service's biological opinion (BO) pursuant to section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1531-1544), as amended (ESA). At issue is the U.S. Environmental Protection Agency's (EPA) approval of the State of Arizona's Arizona Pollutant Discharge Elimination System (AZPDES) program and the impacts that may result from the program transfer. Clean Water Act (CWA) section 402(b) states that EPA "shall approve" a State NPDES program where the State program meets the conditions specified in CWA section 402(b). All of the listed threatened and endangered species and their designated or proposed critical habitats in, adjacent to, or dependent on surface waters in Arizona are considered in this biological opinion.

This BO is based on information provided in the June 21, 2002 biological evaluation (BE), Arizona Department of

Environmental Quality's (ADEQ) project proposal, telephone conversations with EPA, field investigations, meetings, and other sources of information. Literature cited in this BO is not a complete bibliography of all literature available on the species of concern, and its effects, or on other subjects considered in this opinion. A complete administrative record of this consultation is on file at Arizona Ecological Services Field Office in Phoenix, Arizona.

Consultation History

We received your request for formal consultation and the attached BE on June 24, 2002. In your letter and BE, you determined that the proposed transfer of authority to ADEQ is simply an administrative action that is not likely to have adverse effects on water quality and therefore is not likely to adversely affect listed species or critical habitat. On August 20, 2002, we responded to your letter and requested more information, including how the section 7 process will continue to be implemented following AZPDES approval The EPA responded in a letter we received on August 22, 2002, that it would follow the "Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act" (National MOA), and that the National MOA "procedures contemplate close cooperation, but not section 7 consultation".

Under the terms of the National MOA, we continued exploring ways to retain conservation mechanisms equal to or greater than those provided under section 7 of the

ESA. On September 13, 2002, we met with you and ADEQ to discuss the issue. At that meeting, ADEQ voluntarily agreed to provide us copies of all future Notices of Intent (NOIs) for the approval of construction stormwater permits in northwest Tucson and other identified areas of concern. ADEQ has also agreed to include a form letter from us to the applicants informing them of ESA procedures, the potential for section 9 violations of the ESA, and how non-Federal applicants can obtain a section 10(a)(1)B permit for incidental take of endangered species. ADEQ recently received a $79,000 grant from EPA to develop a "Smart Notice Of Intent" system to be used when Phase II of the construction stormwater permitting program begins. However, while we see the value in ADEQ's offer and intend to accept it, we did not believe the resulting process would provide the species conservation equivalent to that required of Federal agencies under section 7 of the ESA since it does not provide sufficient guidance for a landowner to determine if listed species may be adversely affected, will not protect plant species, and does not protect habitat essential for species recovery. EPA will provide funding to ADEQ for three years to run its program although EPA did not include funding as part of the proposed action and was not considered in this BO.

Subsequently, EPA, ADEQ, and the FWS pursued avenues to continue protection for listed species under the National MOA. We elevated our concerns to our Region 2 office. When our Regional Director and EPA's Regional Administrator could not resolve the issue on October 2, 2002, we elevated the discussion to our respective Washington, D.C. headquarters. In discussions with our Washington, D.C.

office, we reviewed the definition of "indirect effect"[1]. We conclude that development in Arizona is reasonably certain to occur in the future, but the transfer of the permit authority will not cause the continued real estate development. Therefore, we are not considering continued development absent EPA's administration of the program to be an indirect effect of the proposed action. This exclusion of certain impacts of development from our evaluation of indirect effects is dependent on the specific circumstances of the program approval action considered in this consultation and is not necessarily applicable to consultations on federally permitted actions or other Federal permit programs. We elaborate on our reasoning in the Effects of the Action section below.

January 14, 2002: EPA Region 9 received Arizona's AZPDES program submission.

January 23, 2002: EPA sent its request for informal consultation on AZPDES approval.

February 15, 2002: EPA determined that Arizona's AZPDES program package is incomplete.

May 30, 2002: Teleconference between EPA Region 9 and Arizona Ecological Services Field Office (AESO).

June 13, 2002: Teleconference between EPA Region 9 and AESO.

June 24, 2002: EPA Region 9 submitted Biological Evaluation to AESO requesting formal consultation and

[1] Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur 51 FR19958.

determined that the AZPDES approval may affect, but is not likely to adversely affect all Arizona listed species and their critical habitats.

July 11, 2002: EPA Region 9, AESO, and FWS Region 2 conferenced.

August 20, 2002: AESO submitted request for more information to EPA Region 9.

August 22, 2002: EPA indicated that it had already supplied AESO with the necessary information.

September 13, 2002: AESO, EPA Region 9, and ADEQ met to discuss ways to ameliorate the loss of Federal conservation mandates under section 7 after AZPDES approval. This meeting satisfied Level 1 criteria for elevation under the National MOA.

September 26, 2002: AESO sent letter to EPA acknowledging EPA's request for formal consultation.

October 2, 2002: FWS Region 2 Director and EPA Region 9 Administrator agreed to elevate issue according to National MOA satisfying Level 2 requirements.

October 4, 2002: AESO and EPA Region 9 jointly submitted an elevation paper according to the National MOA for Level 3 review.

October 16, 2002: EPA Region 9 sent AESO copies of ESA comments it received during its public comment period.

October 28, 2002: EPA Region 9 forwarded AESO copies of Arizona Game and Fish Department comments regarding AZPDES approval.

November 1, 2002: Terry Oda and Steve Spangle met in FWS Arizona Ecological Services Field Office to discuss development of BO.

November 14, 2002: Transmitted draft BO to EPA.

November 20, 2002: Received electronic comments on draft BO from EPA and ADEQ.

November 22, 2002: Telephone conference held between EPA Region 9 and AESO.

November 27, 2002: Second draft BO sent to EPA.

December 2, 2002: EPA sent second draft BO comments to AESO.

BIOLOGICAL OPINION

Description of the Proposed Action

The action in review is the proposed approval of AZPDES for the State of Arizona by EPA Region 9. The CWA authorizes States to administer the National Pollutant Discharge Eliminating System (NPDES) program provided the State program meets the conditions specified in CWA section 402(b) and its implementing regulations. ADEQ would administer the AZPDES program under State law, which the EPA will have determined to be at least as stringent as the CWA and its implementing regulations. A significant benefit of Arizona's assumption of the NPDES program is that the number of State staff dedicated to permit issuance and permit enforcement will be substantially greater than that which was available to EPA when it issued NPDES permits for Arizona. Currently, EPA has 2 full-time staff involved in permitting, planning, and coordination activities for Arizona. There are also 2.5 full

time employees currently working on compliance and enforcement. Arizona currently has 10 staff assigned to its water permitting program and is expected to hire another 9 staff for an estimated total of 19 staff. Because NPDES permits are labor-intensive, increased staffing should provide significant environmental benefits by ensuring that high-quality permits are issued more timely, and that expired, but administratively continued, NPDES permits will be reduced. More State and EPA resources can now be devoted to permit writing and compliance.

Also, ADEQ has voluntarily agreed to provide us copies of all future NOIs for the approval of construction stormwater permits in northwest Tucson and other identified areas of concern. ADEQ will include a form letter from us to the applicants informing them of ESA procedures, the potential for section 9 violations of the ESA, and how non-Federal applicants can obtain a section 10(a)(1)(B) permit for incidental take of endangered species.

EPA has agreed to follow the National MOA coordination process described in detail below for AZPDES permits where there are concerns about any listed species or their critical habitat, including aquatic-dependent species or upland, terrestrial species. EPA notes that it does not have CWA authority to object to State NPDES permits to address non-water-quality-related concerns about listed species or critical habitat.

I. Overview of the Federal Clean Water Act Programs

A. The Federal Clean Water Act

The CWA established the basic structure for regulating discharges of pollutants into waters of the United States.

It gave EPA the authority to implement pollution control programs such as setting wastewater effluent standards for industry. The CWA also required the establishment of water quality standards (WQS) for all surface waters. The CWA made it unlawful for any person to discharge any pollutant from a point source into navigable waters, except when in compliance with a NPDES permit. It also funded the construction of sewage treatment plants under the construction grants program and recognized the need for planning to address the critical problems posed by non-point source pollution.

The environmental protection goals of the CWA contain specific references to protecting "fish", "shellfish", "wildlife", and "aquatic life"; these terms clearly encompass federally listed and proposed species. Section 101(a) provides as its goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" 33 U.S.C. § 1251(a)(2). This goal is consistent with the ESA's purpose of providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved (16 U.S.C. 1531 § 2(b)).

B. Water Quality Standards

Water quality standards are not a part of the proposed action and therefore are not subject to this consultation. However, because the AZPDES program must be administered to comply with WQS, a brief discussion of WQS and the status of WQS in Arizona is included.

Section 303 of the CWA requires States to develop water quality standards which are designed to protect the public health or welfare, enhance the quality of water and serve the purposes of the CWA. Water quality standards consist

of: 1) designated uses of waterways (e.g., protection and propagation of fish, shellfish, and wildlife); 2) criteria which will ensure the protection of designated uses; and 3) an anti-degradation policy that protects existing uses and provides a mechanism for maintenance of high water quality. The CWA directs States to take into consideration, among other things, the "propagation of fish and wildlife" when revision or adopting WQS (33 U.S.C. § 1313(c)(2)(A)). Under the CWA, the State must review and, if necessary, revise adopted standards once every three years using a public participation process.

The EPA has a mandatory duty to review and either approve or disapprove WQS submitted by the State. Pursuant to 40 CFR 131.21, WQS revisions submitted to EPA do not become effective for CWA purposes until the EPA acts to approve them. The CWA requires the EPA to approve (within 60 days) or disapprove (within 90 days) any WQS revisions submitted by the State. Upon disapproval, the EPA has the statutory duty to promptly propose and promulgate replacement standards. Where required under Section 7 of the ESA, EPA consults with the Service on federally promulgated WQS and on the approval of new or revised State or Tribal water quality standards and implementing procedures that are subject to EPA review and approval under Section 303(c) of the CWA.

The State of Arizona conducted a complete WQS program revision on January 10, 1992. Following the State's adoption and submission of WQS on February 18, 1992, the EPA initiated formal consultation with the Service pursuant to Section 7 of the ESA on May 21, 1993. That consultation, the first programmatic consultation on the Arizona WQS, concluded on February 16, 1994 with a BO from the

Service. On April 26, 1996, Arizona submitted revisions of the State WQS to the EPA. On June 27, 1996, EPA initiated Section 7 consultation with the Service on those revisions, and on December 11, 1998, the consultations on those revisions was concluded with the Service's issuance of a biological opinion. The State adopted revisions to the April 26, 1996 WQS. These revisions were received by the EPA on April 11, 2002. If necessary, the EPA's action on those revisions will be the subject of a separate consultation under Section 7.

C. National Pollutant Discharge Elimination System Permit Program

The CWA sections 307, 318, 402, and 405 establish the NPDES permit system to regulate the discharge of pollutants from point sources into navigable waters (33 USC 1311, 1342). The NPDES program is the national program from issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and for imposing and enforcing pretreatment requirements.

1. Permits

Permits are licenses for facilities to discharge a specified amount of pollutant into a receiving water under certain conditions. In addition to discharge limitations, NPDES permits impose other requirements such as monitoring procedures and pollution prevention measures (known as "best management practices"). Permits typically contain technology based limits which represent the best conventional technology (BCT), for conventional pollutants (biological oxygen demand, total suspended solids, fecal coliform,

pH, and oil and grease), best available technology economically achievable (BAT) for nonconventional and toxic pollutants, and secondary treatment limits for publicly-owned treatment works (POTWs) and new source performance standards (NSPS) for new sources. Where technology-based or secondary treatment limits are not sufficient to meet water quality standards in receiving waters, permits must contain more stringent limits (known as water quality-based limits or "WQBELs") to meet those water quality standards so that the receiving waters meet those WQS. The CWA requires that NPDES permits contain effluent limitations that contribute to the maintenance and attainment of water quality which assures "the protection and propagation of a balanced population of shellfish, fish, and wildlife . . . " (33 U.S.C. 1312(a)).

There are two basic types of permits: individual and general. An individual permit is a permit specifically tailored for an individual facility. The permitting authority develops a permit for that facility based on information contained in the permit application. Before issuance, the permit is public noticed for 30 days. Public notice of a draft permit elicits comments from concerned individuals or agencies. The permitting authority is obliged to respond to all significant comments. A public hearing may be requested in writing by any interested party. Upon resolution of any issues, the permit may be issued to the facility for up to five years.

A general permit is developed and issued by a permitting authority to cover multiple facilities within a specific category. These facilities must be in a geographical area that corresponds to existing geographic or political boundaries. General permits are regulated under 40 CFR 122.28. These permits may be written to cover categories of point sources having

common elements such as storm water point sources; facilities that involve the same or substantially similar types of operations; facilities that require the same effluent limitations or operating conditions or standards for sewage sludge use or disposal; facilities that require the same monitoring where tiered conditions may be used for minor difference within class; and facilities that are more appropriately regulated by a general permit. The general permit clearly identifies the applicable conditions for each category or subcategory of dischargers are subject to the regulated water quality based limits. Typical general permits include those for Concentrated Animal Feeding Operations (CAFOs), de minimis dischargers, and storm water dischargers. These permits are subject to the same administrative processes for review and comment as individual permits.

After the development of the general permit, dischargers seeking coverage under a general permit submit to the permitting authority a written notice of intent (NOI) to be covered by the general permit. The requirements for the contents of the notice of intent are specified in the general permit. While there is no public comment opportunity on the general permit, the NOI submittal process generally does not provide a specific opportunity for public comment.

2. Pretreatment

Pretreatment programs are designed to eliminate the serious problems posed when toxic pollutants are discharged into sewage systems. The CWA called for the EPA to develop National Pretreatment Standards to restrict the quantity of toxic industrial pollutants discharged into sewage systems. These standards forbid certain types of discharges by any sewage system user (40 CFR 403.5) and place restrictions on 126 toxic

pollutants for specific industrial categories. Publically owned treatment works (POTWs) with flows greater than 5 million gallons per day (mgd) or smaller POTWs with significant industrial dischargers are required to develop local pretreatment programs which must enforce all National Pretreatment Standards.

II. State NPDES Approval

The purpose of this section is to explain the legislative authorities that allow a State to be authorized to operate a NPDES program, the minimum requirements of a State that wishes to receive authority to operate a NPDES program, and the process for a State to apply for the authority to operate a NPDES program. This section will also provide a description of the current status of Arizona's application for authority to operate the AZPDES program.

A. Legislative Authorities

States may be approved to administer the NPDES program. While the CWA does not require that states operate the NPDES program, the CWA's language and legislative history clearly reflect a Congressional intent that states be primarily responsible for administering the program (33 U.S.C. 1251(b))[1]. States may choose to apply for the

[1] "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the states manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is

(Continued on following page)

following programs: basic municipal and industrial permit program, pretreatment program, Federal facilities program, general permit program, and sludge permit program. The approval process is a shift in administration of the program from the EPA to the State or Tribe. The State or Tribe administers the program under State or Tribal law, which the EPA has determined to be at least as stringent as the CWA and its implementing regulations. Any programmatic actions taken by the State or Tribe are State or Tribal actions, not Federal actions.

B. State Requirements

Under section 402 of the CWA, eligible States can obtain the EPA's approval to operate their own NPDES permit programs, provided they meet the requirements of section 402 (b) and applicable Federal regulations at 40 CFR 122, 123, 124, and 125, and that it has the resources and legal authority to do so. States must have the legal authority to implement all of the required provisions, and the program must be administered in conformance with each provision. To date, forty-four states have authorized NPDES programs.

C. Application Process

The EPA has 30 days from receipt of a State program submission to notify the State whether its submission is

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further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution." 33 U.S.C. 1251 (b).

complete (40 CFR 123.21). After determining that the State has a complete program submittal, the EPA has 90 days from the submittal date to approve or disapprove the program based on 40 CFR 123.61(b) and the CWA.

D. Arizona Status

As stated above, the State of Arizona is requesting approval from EPA for ADEQ to administer the NPDES program as the AZPDES program. The AZPDES program will cover all permitting, surveillance/inspection, public assistance, and enforcement regulatory processes associated with the following:

1. Issuance of individual permits for discharges from industrial, commercial, mining, and silvicultural dischargers; animal feeding operations and aquatic animal production facilities; and domestic wastewater treatment facilities that include POTWs and privately-owned treatment works;

2. Issuance of general permits;

3. Administration of the NPDES pretreatment program;

4. Administration of all stormwater discharge programs, including municipal storm sewer systems (combined and separate), general permits for stormwater discharges, and individual permits for stormwater only discharges; and

5. Administration of permitting for Federal facilities.

The AZPDES program submittal includes the following documents as required by 40 CFR 123.21:

1. A letter from the Governor of Arizona requesting approval of the described program:

2. An Attorney General's statement of authority that Arizona's laws are as stringent as the CWA;

3. A Memorandum of Agreement to be signed by EPA Region IX Administrator upon approval of the program;

4. A complete program description, as required by 40 CFR 123.22, describing how the State intends to implement the AZPDES program; and

5. Copies of all applicable State statutes and regulations, including those governing the State administrative process.

III. Arizona's Proposed Program

A. Individual Permits

Arizona individual permits may cover industrial, stormwater, commercial, mining, and silvicultural dischargers; animal feeding operations and aquatic animal production facilities; and domestic wastewater treatment facilities that include POTWs and privately owned treatment works. EPA issued NPDES permits will become AZPDES permits upon approval of the AZPDES program.

The individual permit issuance process includes application review, permit development, and public notice and issuance. Arizona permits will include technology and, as needed, water quality-based effluent limits. The Arizona WQS will be used to determine the applicable water quality-based effluents limits for the receiving water.

After the creation of a draft permit, the draft permit will be public noticed in a local newspaper for at least 30 days. ADEQ will send copies of the public notice, draft permit, and a fact sheet to the EPA Region 9 for review, unless EPA waives its right to receive such documents. The EPA may make general comments upon, objections to, or recommendations on the draft permit within thirty days of receiving the draft permit. As required by the NPDES regulation and described in the National MOA, ADEQ will provide notice and copies of draft permits to the Service. ADEQ will notify other interested Federal and State agencies by mailing them a copy of the public notice or draft permit and soliciting their comments. ADEQ will discuss issues with appropriate agencies. Arizona regulations require that a public hearing will be held if significant public interest exists. The public hearing will address final decisions on draft permits. If no comments are received that require a change in the draft permit, the permit is effective immediately upon issuance. No public notice will be required when a request for permit modification, revocation and reissuance, or termination is denied. A written notice of the denial will be give [sic] to the requester and to the permittee, if different from the requester.

Based on all of the comments received, ADEQ will prepare a final permit, or if the draft permit is changed as a result of the comments, the revised permit will be submitted to the EPA for review. ADEQ will provide the applicant and each person who submitted comments or requested notice a response to comments and notify them of the permit decision. A final permit decision will become effective 30 days after service of the notice of the final permit decision unless a different effective date is specified in the decision, or the permit is appealed.

The EPA has the authority to object to State NPDES draft permits in specified circumstances. At the close of the comment period and after resolution of the reasons for EPA objections, ADEQ will issue a permit decision. If ADEQ and EPA are unable to resolve the reasons for EPA's objections, the EPA has the authority to veto and to issue the permit under Federal law. See section entitled "Additional EPA involvement in AZPDES permits" for details on when and how the EPA may object to a permit.

B. General Permits

EPA has issued industrial stormwater, construction stormwater, and CAFO general permits in Arizona. These permits will become AZPDES permits upon approval of the AZPDES program. Arizona's general permit issuance procedures will be similar to those governing individual permits. For example, a general permit will be subject to the same public notice requirements and will undergo the same procedures for EPA approval as an individual permit. In addition, as will be done for individual permits, ADEQ will provide copies of draft general permits to the Service and other interested parties, and afford them an opportunity to comment.

Dischargers seeking coverage under a general permit will submit a written notice of intent (NOI to ADEQ in order to be covered by the general permit unless exempted under the general permit. A NOI is a notice that an applicant submits to the permitting authority indicating its commitment to comply with the terms of a general permit. Each general permit will specify NOI requirements. The information required to be included in an NOI will include,

at a minimum, the legal name and address of the owner or operator, the facility name and address, type of facility or discharges and the receiving stream(s). General permits will also specify the deadlines for submitting NOIs and the dates when a discharge is authorized under the permit. If ADEQ determines that an applicant does not meet the general permit criteria, ADEQ may require the applicant to file an application for an individual permit and may take appropriate enforcement action if the applicant does not comply.

Pursuant to the MOA between Arizona and EPA, the EPA may review any NOI. ADEQ will provide a copy of the NOI to the EPA within 15 days of the EPA's request to review the NOI. The EPA has 10 days after the receipt of the NOI to notify ADEQ of the EPA's determination of whether or not the applicant is eligible for coverage under the general permit. If the EPA determines that an applicant for a general permit does not meet the eligibility criteria of the general permit, ADEQ and the EPA will meet to discuss the basis for EPA's concerns.

C. Pretreatment

To date, the EPA has approved 15 pretreatment systems for municipalities in Arizona. Upon AZPDES program approval, Arizona will assist municipalities in developing pretreatment ordinances. The pretreatment approval determination program includes a public notice process. Public notice in a local newspaper will occur within 20 working days of a POTW pretreatment approval determination. The public notice procedure will provide a minimum public comment period of 30 days. The public noticed

information will be provided to any party upon request and ADEQ is required to circulate the public notice to inform interested an [sic] potentially interested persons of the pretreatment program submission. The required public notice process includes mailing notices of the request for approval of the submission to designated 208 planning agencies, Federal and State fish, shellfish and wildlife resource agencies :(unless such agencies have asked not to be sent the notices); and to any other person or group who has requested individual notice. The applicant, any affected State, and interested State or Federal agency, person, or group of persons may request a public hearing. ADEQ will hold a public hearing if a significant interest in a public hearing exists or if significant issues or information are brought to the attention of ADEQ during the comment period that was not considered previously in the permitting process. ADEQ will not approve a submission if the EPA objects to the approval in writing.

D. Enforcement

The purpose of the EPA's compliance and enforcement program is to ensure compliance with the NPDES regulations. This is achieved through compliance assistance, compliance incentives, and civil and criminal enforcement. NPDES regulations are enforced through civil judicial enforcement for the collection of penalties and/or injunctive relief, through criminal enforcement, and through use of administrative enforcement authorities in order to remedy any noncompliance and deter future violations. Upon approval, ADEQ will have various enforcement tools available to it that are similar to those available to the EPA under the CWA. ADEQ's enforcement tools are

available for all CWA violations under the AZPDES program.

The EPA continues to retain enforcement authority after program approval. Therefore, enforcement is not part of this consultation. While ADEQ will take most of the actions, if the EPA determines that ADEQ has not initiated a timely and appropriate enforcement action against a violator, the EPA may proceed with any or all of the enforcement actions available under section 309 of the CWA. EPA Region 9 currently has ongoing enforcement actions in each of its State administered NPDES programs.

IV. Additional EPA Involvement in the AZPDES Permitting Program

In addition to the oversight authorities outlined in the previous sections, procedures and time lines for the EPA review and objection to State NPDES permits are established by statue [sic] and regulation in CWA Section 402(d) and 40 CFR 123.44. The EPA's approval of State authority to administer a NPDES program is not a delegation of Federal permitting authority; the State operates its program wholly under State law. Approved State programs are, at all times, required to maintain their programs consistent with the minimum statutory and regulatory requirements of the CWA. Upon EPA approval, the State takes over primary responsibility for issuance of permits and administration of the NPDES program within the State. The EPA maintains an oversight role. Where the EPA determines that exercise of its objection authority is appropriate to protect federally-listed or proposed species,

the Agency will utilize its existing authorities under CWA. The EPA will review many, though not all, State draft NPDES permits. The number of State permits reviewed is established in the MOA between the Arizona and EPA Region 9.

In Arizona, the following section from the MOA between Arizona and EPA states the types of permits that the EPA may review. Section IV.D.1. states: "At this time, the EPA waives the right to comment on, or object to, the sufficiency of permit applications, draft permits, proposed final permits (to the extent that it is necessary to submit to the EPA), and final (issued) permits for all discharges or proposed discharges with the exception of the categories described below:

1. Discharges which may affect the waters of another State, Tribe, or nation;

2. Discharges proposed to be regulated by general permits;

3. Discharges from POTWs with a daily average discharge exceeding one million gallons per day (MGD);

4. Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 MGD;

5. Discharges from any major discharger;

6. Discharges from any discharger within any of the industrial categories listed in 40 CFR Part 122 Appendix A;

7. Discharges from any other sources with a daily average discharge exceeding 0.5 MGD, except that EPA may waive review of permits for discharges of non-process wastewater regardless of flow; and

8. POTWs required to have a pretreatment program."

The EPA retains the right to terminate the waiver as to future permit actions, in whole or in part, at any time by sending the State Director a written notice of termination. In addition, the State must supply the EPA with copies of final permits (40 CFR 12324 (e)). Therefore, all permits may be subject to EPA review.

The nature of EPA's review of a particular State permit will vary with the size of the facility and discharge, the pollutants being discharged, the nature of the receiving water, and other environmental factors. However, at a minimum, any EPA review would ensure that a State draft permit limits are consistent with CWA requirements to protect human health and the environment. The EPA does this by, among other things, determining whether State permits indeed attain water quality standards. If the permit does not meet those requirements, EPA has the ability to object to a State draft permit during the permit issuance process. The EPA's authority to object to State issued draft permits is found at CWA Section 402(d) and 40 CFR 123.44(c), which lists nine grounds on which EPA can object to the permit. They are:

1. the permit fails to apply, or to ensure compliance with, any applicable requirement of 40 CFR 123;

2. in specified cases, where the permit would affect waters of another State or Tribe and the written recommendations of the affected State or Tribe have not been accepted by the permitting State and the Regional Administrator finds the reasons for rejecting the recommendations are inadequate;

3. the procedures followed for formulating the proposed permit fail in a material respect to comply with procedures required by CWA or by regulations thereunder or by the MOA between the State and EPA;

4. any finding made by the State Director in connection with the proposed permit misinterprets the CWA or any guidelines or regulations under CWA, or misapplies them to the facts;

5. any provisions of the proposed permit relating to the maintenance of records, reporting, monitoring, sampling, or the provision of any other information requirements are inadequate to assure compliance with permit conditions, including effluent standards and limitations or standards for sewage sludge use and disposal required by CWA, by the guidelines and regulations issued under CWA, or by the proposed permit;

6. in the case of any proposed permit with respect to which applicable effluent standards and limitations or standards for sewage sludge use and disposal under sections 301, 302, 306, 307, 318, 403, and 405 of CWA have not yet been promulgated by the EPA, the proposed permit, in the judgement of the Regional Administrator, fails to carry out the provisions of CWA or of any regulations issued under CWA; the provisions of this paragraph apply to determinations made pursuant to 40 CFR 125.3(c)(2) in the absence of applicable guidelines, to best management practices under Section 304(e) of CWA, which must be incorporated into permits as requirements under Section 301, 306, 307, 318, 403, or 405, and to sewage sludge use and disposal requirements developed on a case-by-case basis pursuant to section 405(d) of CWA, as the case may be;

7. issuance of the proposed permit would in any other respect be outside the requirements of CWA, or regulations issued under CWA; and

8. the effluent limits of a permit fail to satisfy the requirements of 40 CFR 122.44(d) (requiring the imposition of water quality based standards where a discharge has the reasonable potential to exceed WQS).

9. (Not relevant in Arizona)

If EPA objects to a State draft permit and EPA's concerns are not addressed by the State, authority to issue the permit passes to EPA. However, EPA must exercise its general objection authority within 30 days and specific objection authority within 90 days of EPA's receipt of the draft permit. In addition to reviewing draft State permits, EPA may also conduct permit quality reviews (PARS) of final State permits to ensure that the State is issuing good permits. The EPA inspects State permittees and can take Federal enforcement actions against State permittees as described in Section 309 of the CWA. Citizen groups can also sue for permit violations under section 505 of the CWA.

The EPA will periodically review State NPDES programs to ensure that such programs are conforming with Federal requirements. EPA can also withdraw its approval for a State to operate a NPDES program when EPA finds on its own initiative or in response to a petition by a third party that the State is not administering the program in accordance with the CWA.

V. Arizona Assumption of the NPDES Program

A. The National MOA and Coordination Procedures Regarding Issuance of State Permits

Through the National MOA, the EPA intends to utilize the appropriate mechanisms in the EPA's oversight role with

respect to ADEQ-issued NPDES permits to provide continued protection to federally-listed species and designated critical habitat in Arizona following EPA's approval of the AZPDES program. The EPA and the Service have agreed to follow coordination procedures for the EPA review of permits issued by the AZPDES program. These coordination procedures were designed for all existing and new permitting programs approved by EPA under section 402 of the CWA. The purpose of coordination procedures is to achieve the EPA and the Service's shared objectives of protecting the quality of waters of the United States and those species that depend on those waters. The coordination procedures are outlined in Section IX of the National MOA, entitled "Permitting Program Activities".

Implementation of the National MOA procedures will ensure that the Service has an opportunity to review and comment on draft AZPDES permits and work with the State of Arizona and the EPA to address potential effects to federally-listed species and critical habitat. We also note that in Section V of the National MOA, the EPA has agreed to meet regularly with the Service to identify high priority areas of concern, and to assist with determining which categories of NPDES permits should be identified for review by the EPA and the Service for concerns regarding federally-listed species and critical habitat.

Highlights of Section IX of the National MOA that will ensure continued protection of federally-listed species and designated critical habitat in Arizona include the following:

1. The Service will provide the State with information on federally-listed species and any designated critical habitat in the State lands, with special emphasis on aquatic and aquatic-dependent species.

2. The State is obligated under existing CWA regulations to provide notice and copies of draft permits to the Service. EPA will exercise its oversight authority to ensure that the State carries out this obligation. EPA and the Service will work with the State to share information on permits that may raise issues regarding impacts to threatened or endangered species or designated critical habitat.

3. If the Service or the EPA is concerned that a NPDES permit is likely to have more than minor detrimental effects on federally-listed species or critical habitat, the Service or EPA will contact the State (preferably within 10 days of receipt of a notice of a draft State permit) to discuss identified concerns. The Service or EPA will provide appropriate information in support of identified concerns. The Service and EPA will provide copies to each other of comments made to the State on issues related to federally-listed species.

4. If unable to resolve identified issue(s) with the State, the Service will contact EPA not later than five working days prior to the close of the public comment period on the State's draft NPDES permit. Telephone contacts should be followed by written documentation of the discussion with EPA and include or reference any relevant supporting information.

5. If contacted by the Service, EPA will coordinated [sic] with the Service and the State to ensure that the permit will comply with all applicable CWA requirements, including State water quality standards, which include narrative criteria prohibiting toxic discharges, and will discuss appropriate measures protective of federally-listed species and critical habitat.

6. EPA may make a formal objection, where consistent with its CWA authority, or take other appropriate action, where EPA finds that a State NPDES permit

will likely have a more than minor detrimental effect on federally-listed species or critical habitat. For those NPDES permits with detrimental effects on federally-listed species or critical habitat that are minor, it is the intention of the Service and EPA that the Service will work with the State to reduce the detrimental effects stemming from the permit. For those NPDES permits that have detrimental effects on federally-listed species or critical habitat that are more than minor, including circumstances where the discharge fails to ensure the protection and propagation of fish, shellfish and wildlife, and where the State and the Service are unable to resolved [sic] the issues, it is the intention of the Service and EPA that EPA would work with the State to remove or reduce the detrimental impacts of the permit, including, in appropriate cases, by objecting to and federalizing the permit where consistent with EPA's CWA authority. EPA will use the full extent of its CWA authority to object to a State permit where EPA finds (taking into account all available information, including any analysis conducted by the Service) that a State permit is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.

7. EPA may review or waive review of draft State NPDES permits (40 CFR 123 (d)). EPA will work with the Service through the local/regional coordinating teams described in the National MOA to help determine which categories of permits should be reviewed for endangered species concerns. If EPA finds that a draft permit has a reasonable potential to have more than a minor detrimental effect on listed species or critical habitat, and review of a draft permit has been waived, EPA will withdraw this waiver during the public comment period (40 CFR 123.24 (e)(1)).

8. If EPA objects to a NPDES permit under paragraph 6 above, EPA will follow the permit objection procedures outlined in 40 CFR 123.44 and coordinate with the Service in seeking to have the State revise its permit. A State may not issue a permit over an outstanding EPA objection. If EPA assumes permit issuing authority for a NPDES permit, EPA will consult with the Service prior to issuance of the permit (as a Federal action) as appropriate under Section 7 consultation if it may affect listed species or critical habitat. EPA will meet ESA requirements as provided in 40 CFR 122.49(c) and 50 CFR part 402 governing the issuance of NPDES permits.

B. Additional Continuing Protections under the ESA, CWA, and AZPDES program

Following AZPDES program approval, dischargers will continue to be subject to the requirements, prohibitions, and implementing regulations of the ESA, CWA, and the AZPDES Program, each of which provides protection to federally-listed species and/or designated critical habitat in addition to that afforded by the coordination procedures described above.

ESA section 9 will continue to apply to State and NPDES permittees. ESA Section 9 and Federal regulations pursuant to ESA section 4(d) state that it is unlawful for any person to "take" any fish or wildlife species that is listed under the ESA. "Take" is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct". Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding,

or sheltering. Harass is defined by Service as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.

Section 7 of the ESA will continue to apply to EPA's proposed approval of the WQS submitted by the State of Arizona where EPA finds that such approval may affect federally-listed species or designated critical habitat. As noted above, WQS are used to develop NPDES permit limits, and are used as the basis for enhancing public health, water quality, and wildlife.

The EPA will oversee the AZPDES permit program. The EPA will review draft permits ensuring, at a minimum, that the permit limits are consistent with CWA requirements. Where permits have been changed as a response to public comment, EPA will have another opportunity to review those permits. For general permits, the EPA may review NOIs to ensure that the NOI meets the requirements of the permit. The EPA has the authority to object to both permits and pretreatment programs. After AZPDES program approval, the EPA will retain authority to enforce based on CWA violations in Arizona. Finally, the EPA will periodically review the State NPDES program to ensure that the program is conforming with Federal requirements. The AZPDES program must be at least as stringent as the CWA and its implementing regulations. There will be no change in enforcement authorities of the EPA as the EPA continues to retain its enforcement authority after program approval.

Public participation is an important avenue for individuals to increase protection for federally-listed species and

designated critical habitat. All AZPDES permits and pretreatment programs will be public noticed by ADEQ for 30 days. This period of time provides the opportunity for individuals to become aware of and comment on proposed projects. Public hearings will be held to resolve issues surrounding draft permits if there is significant public interest, or if significant issues or information have bee [sic] brought to the attention of ADEQ during the comment period that was not considered previously in the permitting process. The permit writer will respond to all comments received during the public notice and hearing. Citizens can sue in response to permit violations under Section 505 of the CWA.

In Arizona there is a native plant law and a permit program to regulate the movement and/or salvage of sensitive plants on the Department of Agriculture's list of protected plants. The list includes federally-listed plant species. The following paragraph is a summary of Arizona's native plant laws and an overview of the permit program:

> Native plants cannot be removed from any lands, whether they are owned by a private individual or managed by a government agency, without a permit from the Arizona Department of Agriculture. Theft of protected native plants from private, state, or federal lands may result in a felony charge, as well as native plant law violation. Landowners have the right to destroy or remove plants growing on their private land but 20 to 60 days prior to the destruction of any protected native plants, landowners are required to notify the Arizona Department of Agriculture. Landowners can also move protected plants to a different location on their property without a permit from the Department of Agriculture. The

> landowner also has the right to see or give away any plant growing on the land. However, protected native plants growing may not be legally possessed, taken, or transported from the growing site without a permit from the Arizona Department of Agriculture (ARS 3-901 *et seq.*; A.A.C. R3-4-601 *et seq.*).

Status of the Species and Environmental Baseline

The status of all listed species in Arizona can be found at AESO's public website at *http://www.arizonaes.gov.* in the "Document Library" under "Documents by Species" and in previous opinions. For a list of all threatened and endangered plants and animals and critical habitats in, adjacent to, or dependent on surface waters in Arizona, refer to Appendix I at the end of the BO. Then, referring to AESO's website, click on the "Document Library", next "Documents by Species", and search for information on a species of choice. Beginning with plants, the species are divided by taxonomic groups. Click on a species, then refer to the "General Species Information" in the Title column. Choose the saguaro cactus icon on the left to access the general species account. Readers need Adobe Acrobat Reader in order to access the species accounts. For more information, scroll down the list of available documents for a species. Some species have "Fact Sheets" available that also provide status and environmental baseline information. Also, additional information on the current status of species and environmental baseline can be found in previous opinions, also at AESO's public website. Once in the "Document Library", go to "Biological Opinions". Search for the most recent opinion on a species of choice by scrolling down the page, scanning the "Listed Species Affected" column on the right.

The environmental baseline includes past and present impacts of all Federal, State, or private actions in the action area, the anticipated impacts of all proposed Federal actions in the action area that have undergone formal or early section 7 consultation, and the impact of State and private actions which are contemporaneous with the consultation process. The environmental baseline defines the current status of the species and its habitat in the action area to provide a platform from which to assess the effects of the action now under consultation.

EPA currently conducts ESA section 7 consultations on its own NPDES permitting actions in Arizona where it finds that its action may affect listed species or critical habitat in, adjacent to, or dependent on surface waters in Arizona. Its consultations have considered all effects of the Federal permitting action, including indirect effects and the effects of interrelated and interdependent actions. Effects considered have included, in some cases, construction activities and groundwater pumping. There have been a total of 17 Pima pineapple cactus formal consultations since listing; five of them have been with EPA, all occurring after 2000. A total of 2,423 acres of Pima pineapple cactus have been conserved in some manner. Of that amount, 1,146 acres (47%) were conserved through conservation measures gained through section 7 consultation with EPA, specifically on indirect effects from authorizing general construction storm water permits.

Similarly, the conservation status of the cactus ferruginous pygmy-owl (pygmy-owl) has benefitted from our ability to conduct section 7 interagency consultations with EPA. We have issued 12 residential and commercial development biological opinions involving the pygmy-owl to EPA in northwest Tucson since 1999; these total

7,517.86 acres. Through the section 7 consultation process, we work with developers to reduce development impacts in pygmy-owl breeding areas, and maintain dispersal and movement corridors to reduce the likelihood of genetically isolated populations. We are in informal consultation for 16 residential and commercial development projects throughout Maricopa, Pinal, and Pima counties solely because of the EPA section 7 consultation responsibilities; these projects consist of approximately 30,000 acres and would most likely require formal consultation if they remain a Federal action. Absent a Federal nexus, projects planned for areas where pygmy-owls are present will be reviewed for the appropriateness of developing a habitat conservation plan under section 10 of the ESA.

Prior to listing of the pygmy-owl and section 7 consultations, most construction in pygmy-owl habitat was high-density with no conservation. Pygmy-owls do not utilize areas of high-density development; in addition to the loss of habitat, the resulting habitat fragmentation affects dispersal, courtship, and pair bonding. The northwest Tucson population consistently has the highest known productivity of young produced each year and contains 7 of the 18 known pygmy-owls in the State, or approximately 40°% of the known population.

We have received 104 NOIs for authorization under the construction stormwater permit. Out of the 104 NOIs, we believe that 72 NOI may be a concern for either the Pima pineapple cactus, the pygmy-owl, or both; the development that will occur according to these NOIs will total approximately 2,633 acres. Of these NOIs, project development will affect 18 acres of Pima pineapple cactus habitat, 1,267 acres of pygmy-owl habitat, and 1,348 acres of habitat

potentially occupied by both Pima pineapple cactus and pygmy-owl habitat.

In summary, we currently consult with the EPA on NPDES permits and NOIs under the general construction stormwater permit, where listed species and/or critical habitat are likely to be adversely affected by construction activities. This consultation process has provided some measures to protect species or minimize effects to species and critical habitat, including the Pima pineapple cactus, razorback sucker, Gila topminnow, southwestern willow flycatcher, and cactus ferruginous pygmy-owl.

Effects of the Action

Effects of the action refer to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated and interdependent with that action, that will be added to the environmental baseline. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration. Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur (50 CFR 402.02). Therefore, when examining indirect effects we first determine whether a Federal action causes an indirect effect. We then analyze whether an indirect effect caused by the action is reasonably certain to occur.

While reviewing this above referenced EPA approval, we have spent considerable time analyzing direct and indirect effects. In the course of our analysis, we have expressed concerns that the approval will result in a loss of section 7

consultation-related conservation benefits. We have stated that the loss of these conservation benefits is an indirect effect of the approval. Furthermore, we have stated that the loss of conservation benefits as an indirect effect will appreciably reduce the conservation status of the cactus ferruginous pygmy-owl and the Pima pineapple cactus.

After further reflection and analysis of causation and the definition of indirect effects found in our Consultation Handbook, our final opinion is that the loss of section 7-related conservation benefits is not an indirect effect of the approval action. This proposed approval does not cause the loss of conservation benefits for listed species or critical habitat. A loss of section 7 authority over non-Federal actions in the action area does not necessarily mean that listed species in the action area will lose all opportunity to receive conservation benefits stemming from the ESA. Sections 9 and 10 of the ESA, and section 7 for other Federal agency actions in the action area, still provide some measure of protection and conservation of the species (see discussion below).

Regarding causation, the FWS uses the "but for" test. This test means that a Federal action is the cause of an effect if, and only if, "but for" the action the effect would not have occurred. Put another way, the action (EPA approval of NPDES to the State of Arizona) must have been a substantial factor in the occurrence of the effect (loss of conservation benefit). This test assumes that a Federal action cannot be the cause of some effect unless the Federal action is necessary for the occurrence of the effect. If the effect occurs whether the proposed Federal action goes forward or not, then there is no "but for" causation link between the proposed Federal action and the effect. In order for an indirect effect to be reasonably certain to

occur, it must be more than speculative but does not have to be absolutely certain. For a loss of conservation benefit to be an indirect effect, the loss of conservation benefit must also be "reasonably certain to occur". Whether or not actions are reasonably certain to occur is evidenced by appropriations, work plans, permits issued, or budgeting; they follow a pattern of activity undertaken by an agency in an action area; or they are a logical extension of the proposed action.

In regards to water quality-related impacts, we believe that there will not be any direct effects of the action since the proposed action is merely an administrative transfer of authority. Although there will likely be indirect effects stemming from water quality issues, the location, frequency, and magnitude of those effects are unknown at this time and cannot be quantified or summarized. Further, when these effects occur, we believe these indirect actions will be adequately addressed by the resolution processes established in the National MOA.

We do not believe that the approval of the program will cause any increased development or an increase in permit requests under the AZPDES program. Developments are driven by any number of factors, including but not limited to demand, supply, economics, political decisions, zoning regulations, and financial market stability. Based upon the best available information, development in the action area will not be caused by EPA's proposed approval. The approval does not provide an incentive to develop in the action area, as would a new highway or water line. The approval merely changes the NPDES regulating authority from EPA to the State of Arizona. While development may be reasonably certain to occur in the future, EPA's approval action will not cause development. Therefore,

development is not an indirect effect of the approval action. Further, loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

Finally, EPA Region 9 has determined that it does not have the legal authority to regulate the non-water-quality-related impacts associated with State NPDES-permitted projects that are of concern to FWS, including the authority to object to such permits based on grounds other than guidelines and requirements of the CWA such as non-water quality related impacts to listed species and critical habitat. EPA Region 9 believes that its ability to address any FWS concerns arising in this consultation is limited by its CWA authorities, We defer to EPA in regard to its interpretation of the CWA. Accordingly, even if section 7 consultation was to occur after a state assumes the program, the conservation benefits that actually could be obtained through consultation are speculative at best.

Further, it is speculative to conclude that the loss of conservation benefit is a necessary result of EPA's approval of the NPDES program to the State of Arizona. It is speculative as to whether or not future development will seek and acquire section 10 permits that will require developments to minimize and mitigate the effects of their action to the maximum extent practicable. At this time, we cannot say with any degree of reasonable certainty that section 10 will not provide some level of mitigation and minimization of development impacts, and cannot predict

the degree to which future section 10 processes will aid in species conservation when compared to the benefits that have been historically provided by section 7. It is also speculative as to whether or not more or less conservation benefit will be provided through State and local law and/or regulations. For example, a Sonoran Desert Multi-Species Conservation Plan is currently being drafted to protect the species of greatest concern including cactus ferruginous pygmy-owl and Pima pineapple cactus. Clearly section 9 of the ESA precludes take [sic] of listed species, which precludes significant modification of habitat at areas where pygmy-owls are present. Therefore, the loss of conservation benefit is speculative, unpredictable, and unquantifiable; it is not a logical extension of EPA's approval action and is thus not an indirect effect of the approval action. Further, even if the loss of conservation benefit was an indirect effect, it cannot be said that the approval action will "likely jeopardize" the species or "adversely modify" critical habitat, because at this time and for all the reasons discussed above, the amount and location of future development and required mitigation are speculative.

Cumulative Effects

Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

There are many private, State, and local actions that are going to occur in the future which have the potential to

affect the cactus ferruginous pygmy-owl, Pima pineapple cactus, and other listed species and critical habitats. Although we are concerned and believe that these future, non-Federal actions may lead to impacts that will erode the environmental baseline of the species such that future Federal actions may cause jeopardy, it is not the proposed action itself that is jeopardizing these species.

Pima County has been working on a multi-species conservation plan since 1999. The intent is to produce a Habitat Conservation Plan (HCP) and submit an application for a section 10(a)(1)B permit. It is not known what species will be included in the permit application or what conservation measures will be included in the HCP. There could be some conservation benefits for species addressed in this BO.

Conclusion

After reviewing the current status of all the species and critical habitats in, adjacent to, or dependent on surface waters in Arizona listed in Appendix I, the environmental baseline for the State of Arizona, the effects of the proposed AZPDES program approval and the cumulative effects, it is our biological opinion that the action, as proposed, is not likely to jeopardize the continued existence of these species, and is not likely to destroy or adversely modify designated or proposed critical habitat.

While reviewing this above referenced approval, the FWS has spent considerable time analyzing direct and indirect effects. In the course of this analysis, our field office staff biologists have expressed concerns that the approval will result in loss of section 7 consultation-related conservation benefits. We have stated our belief that the loss of section

7 conservation benefits is an indirect effect of the authorization. Furthermore, we have stated that this loss of conservation benefits will appreciably reduce the conservation status of the cactus ferruginous pygmy-owl and the Pima pineapple cactus. Notwithstanding this, our final opinion is that the loss of section 7-related conservation benefits, which would otherwise be provided by section 7 consultations, is not an indirect effect of the authorization action.

In changing from a Federal permitting program to a State permitting program, the permit-related section 7 processes for consultation will no longer apply. Essentially, there will be no substantive change in the permit program, but there will be a reduction in the number of mechanisms available to both of our agencies to protect federally-listed species and critical habitat in Arizona. We believe that the assumption of the program by the State of Arizona will not cause development, and concur that EPA's CWA-mandated approval of the program has only an attenuated causal link to the reduction in Federal ESA conservation responsibilities.

INCIDENTAL TAKE STATEMENT

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns,

including breeding, feeding, or sheltering. Harass is defined by the Service as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement.

Amount or Extent of Take

The Fish and Wildlife Service does not anticipate the proposed action will incidentally take any species listed in Appendix I.

Disposition of Dead or Injured Listed Species

Upon locating a dead, injured, or sick listed species initial notification must be made to the Service's Law Enforcement Office, Federal Building, Room 8, 26 North McDonald, Mesa, Arizona (telephone: 480/835-8289) within three working days of its finding. Written notification must be made within five calendar days and include the date, time, and location of the animal, a photograph if possible, and any other pertinent information. The notification shall be sent to the Law Enforcement Office with a copy to this office. Care must be taken in handling sick or injured animals to ensure effective treatment and care, and in

handling dead specimens to preserve the biological material in the best possible state.

CONSERVATION RECOMMENDATION

Section 7(a)(1) of the Act directs Federal agencies to utilize their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

1. We recommend that the EPA provide funding to the FWS to conduct section 10 Habitat Conservation Plans with private landowners.

REINITIATION NOTICE

This concludes formal consultation on the AZPDES program authorization as outlined in the BE (EPA 2002). As provided in 50 CFR 402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any

operations causing such take must cease pending reinitiation.

We look forward to working with both the EPA and ADEQ in the future for the recovery and conservation of listed species and critical habitat. We think that the program transfer to Arizona will result in greater water quality and improved coordination among agencies. No further section 7 consultation is required for this project at this time. Should project plans change, or if additional information on the distribution of listed species or critical habitat becomes available, the conclusions herein may need to be reconsidered. If we can be of further assistance in this matter, please contact Carrie Marc (x214) or Debra Bills (x239).

Sincerely,

/s/ Steven L. Spangle
Steven L. Spangle
Field Supervisor

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
Assistant Field Supervisor, Fish and Wildlife Service, Tucson, AZ
Arizona Department of Environmental Quality, Phoenix, AZ (Attn: Karen Smith)
John Kennedy, Habitat Branch, Arizona Game and Fish Department, Phoenix, AZ

Mr. Terry Oda

LITERATURE CITED

U.S. Environmental Protection Agency (EPA), 2002. Biological evaluation for Endangered Species Act consultation on USEPA's proposed approval of the State of Arizona's NPDES program.

Appendix I: List of federally-listed species and critical habitat in, adjacent to, or dependent on surface waters in Arizona.

	Federally-listed species and critical habitat			
	Common Name	**Scientific Name**	**Critical Habitat**	**Species Type**
1	ARIZONA AGAVE	*Agave arizonica*	NO	PLANT
2	ARIZONA CLIFFROSE	*Purshia subintegra*	NO	PLANT
3	ARIZONA HEDGEHOG CACTUS	*Echinocereus triglochidatus var. arizonicus*	NO	PLANT
4	BRADY PINCUSHION CACTUS	*Pediocactus bradyi*	NO	PLANT
5	CANELO HILLS LADIES' TRESSES	*Spiranthes delitescens*	NO	PLANT*
6	COCHISE PINCUSHION CACTUS	*Coryphantha robbinsiorum*	NO	PLANT
7	HOLMGREN MILK-VETCH	*Astragalus holmgreniorum*	NO	PLANT
8	HUACHUCA WATER UMBEL†	*Lilaeopsis schaffneriana ssp. recurva*	YES*	PLANT*
9	JONES' CYCLADENIA	*Cycladenia humilis var. jonesii*	NO	PLANT
10	KEARNEY'S BLUE STAR	*Amsonia kearneyana*	NO	PLANT
11	NAVAJO SEDGE†	*Carex specuicola*	YES*	PLANT*
12	NICHOL'S TURK'S HEAD CACTUS	*Echinocactus horizonthalonius var. nicholii*	NO	PLANT
13	PEEBLES NAVAJO CACTUS	*Pediocactus peeblesianus var. peeblesianus*	NO	PLANT
14	PEIRSON'S MILKVETCH	*Astragalus magdalenae var. peirsonii*	NO	PLANT
15	PIMA PINEAPPLE CACTUS	*Coryphantha scheeri var. robustispina*	NO	PLANT
16	SAN FRANCISCO PEAKS GROUNDSEL†	*Senecio franciscanus*	YES	PLANT
17	SENTRY MILK-VETCH	*Astragalus cremnophylax var. cremnophylax*	NO	PLANT
18	SILER PINCUSHION CACTUS	*Pediocactus sileri*	NO	PLANT
19	WELSH'S MILKWEED†	*Asclepias welshii*	YES	PLANT
20	ZUNI FLEABANE	*Erigeron rhizomatus*	NO	PLANT
21	DESSERT TORTOISE, MOHAVE POPULATION†	*Gopherus agassizii*	YES	REPTILE
22	NEW MEIXCAN RIDGE-NOSED RATTLESNAKE†	*Crotalus willardi obscurus*	YES	REPTILE

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	Federally-listed species and critical habitat			
	Common Name	**Scientific Name**	**Critical Habitat**	**Species Type**
23	KANAB AMBERSNAIL	*Oxyloma haydeni kanabensis*	YES*	MOLLUSK*
24	BLACK-FOOTED FERRET	*Mustela nigripes*	NO	MAMMAL
25	HUALAPAI MEXICAN VOLE	*Microtus mexicanus hualpaiensis*	NO	MAMMAL
26	LESSER LONG-NOSED BAT	*Leptonycteris curasoae yerbabuenae*	NO	MAMMAL
27	MEXICAN GRAY WOLF	*Canis lupus baileyi*	NO	MAMMAL
28	MT. GRAHAM RED SQUIRREL†	*Tamaisciurus hudsonicus grahamensis*	YES	MAMMAL
29	OCELOT	*Leopardus (=Felis) Pardalis*	NO	MAMMAL
30	SONORAN PRONGHORN	*Antilocapra americana sonoriensis*	NO	MAMMAL
31	APACHE (ARIZONA) TROUT	*Oncorhynchus apache*	NO	FISH*
32	BEAUTIFUL SHINER†	*Cyprinella formosa*	YES*	FISH*
33	BONYTAIL CHUB†	*Gila elegans*	YES*	FISH*
34	COLORADO PIKEMINNOW	*Ptychocheilus lucius*	NO	FISH*
35	DESERT PUPFISH†	*Cyprinodon macularius*	YES*	FISH*
36	GILA TOPMINNOW	*Poeciliopsis occidentalis occidentalis*	NO	FISH*
37	GILA TROUT	*Oncorhynchus gilae*	NO	FISH*
38	HUMPBACK CHUB†	*Gila cypha*	YES*	FISH*
39	LITTLE COLORADO SPINEDACE†	*Lepidomeda vittata*	YES*	FISH*
40	LOACH MINNOW†	*Tiaroga cobitis*	YES*	FISH*
41	RAZORBACK SUCKER†	*Xyrauchen texanus*	YES*	FISH*
42	SONORA CHUB†	*Gila ditaenia*	YES*	FISH*
43	SPIKEDACE†	*Meda fulgida*	YES*	FISH*
44	VIRGIN RIVER CHUB†	*Gila robusta seminuda*	YES*	FISH*
45	WOUNDFIN†	*Plagopterus argentissimus*	YES*	FISH*
46	YAQUI CATFISH†	*Ictalurus pricei*	YES*	FISH*
47	YAQUI CHUB†	*Gila purpurea*	YES*	FISH*
48	YAQUI TOPMINNOW	*Poeciliopsis occidentalis sonoriensis*	NO	FISH*
49	BALD EAGLE	*Haliaeetus leucocephalus*	NO	BIRD*
50	BROWN PELICAN	*Pelecanus occidentalis californicus*	NO	BIRD*

	Federally-listed species and critical habitat			
	Common Name	**Scientific Name**	**Critical Habitat**	**Species Type**
51	CACTUS FERRUGINOUS PYGMY-OWL†***	*Glaucidium brasilianum cactorum*	YES	BIRD
52	CALIFORNIA CONDOR	*Gymnogyps californianus*	NO	BIRD*
53	MASKED BOBWHITE	*Colinus virginianus ridgewayi*	NO	BIRD
54	MEXICAN SPOTTED OWL†	*Strix occidentalis lucida*	YES	BIRD
55	NORTHER APLOMADO FALCON	*Falco femoralis septentrionalis*	NO	BIRD*
56	SOUTHWESTERN WILLOW FLYCATCHER	*Empidonax traillii extimus*	NO	BIRD*
57	WHOOPING CRANE†	*Grus americana*	YES*	BIRD*
58	YUMA CLAPPER RAIL	*Rallus longirostris yumanensis*	NO	BIRD*
59	SONORA TIGER SALAMANDER	*Ambystoma tigrinum stebbinsi*	NO	AMPHIBIAN*
60	CHIRICAHUA LEOPARD FROG**	*Rana chiricahuensis*	NO	AMPHIBIAN*

* Aquatic and aquatic dependent species for the National Section 7 Consultation on Aquatic Life Criteria, as determined by the Service.

† Species with designated or proposed critical habitat in Arizona.

** 67 FR 40790. June 13, 2002. Endangered and Threatened Wildlife and Plants; Listed of the Chiricahua Leopard Frog (*Rana chiricahuensis*); Final Rule.

*** 67 FR 71032. November 27, 2002. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl (*Glaucidium brasilianum cactorum*); Proposed rule.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEFENDERS OF WILDLIFE, et.al., Plaintiffs, vs. LT. GENERAL ROBERT B. FLOWERS, et.al., Defendants.	No. CIV 02-195-TUC-CKJ **ORDER** (Filed Jul. 17, 2003)

As set forth below, consistent with this Court's June 2, 2003 Order (Doc. # 151), this Court hereby severs Claim 7 of Plaintiffs' Second Amended Complaint and transfers it to the United States Court of Appeals for the Ninth Circuit.

Procedural Background

On June 2, 2003, this Court found that it lacks subject matter jurisdiction over Claim 7 of Plaintiffs' Second Amended Complaint – i.e., Plaintiffs' challenge to the United States Fish and Wildlife Service's issuance of a December 3, 2002 Biological Opinion on the Effects of the Environmental Protection Agency's Transfer of its National Pollutant Discharge Elimination System program for Arizona to the State of Arizona – as the United States Court of Appeals for the Ninth Circuit has exclusive jurisdiction over this challenge. *See* Doc. # 151. Furthermore, it indicated its intent to sever Claim 7, pursuant to Rule 21, Fed. R. Civ. P., and transfer it to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1631. However, it granted the parties and

interested intervenors the opportunity to advise this Court if they wished to proceed in a different manner with respect to Claim 7. The Court is now in receipt of memorandums from Plaintiffs Defenders of Wildlife and the Center for Biological Diversity ("Defenders"), the United States Fish and Wildlife Service ("USFWS"), and the intervenors National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona (collectively, "Home Builders"). No response was filed by intervenor State of Arizona nor intervenors Saguaro Ranch Investments LLC and Saguaro Ranch Development Corporation ("Saguaro Ranch").

In their response, Defenders indicated their desire to have Claim 7 adjudicated on the merits as expeditiously as possible. As such, they recommended that (1) if the USFWS represents to this Court that it will not object to the transfer of Claim 7 to the Ninth Circuit pursuant to 28 U.S.C. § 1631 and it will not argue that the Ninth Circuit lacks jurisdiction to dispose of Claim 7 on the merits, this Court should sever and transfer Claim 7, and (2) if the USFWS opposes transfer and states that it will object to the Ninth Circuit asserting jurisdiction over and rendering a decision on the merits of Claim 7, this Court should dismiss Claim 7 without prejudice while authorizing an immediate appeal under Rule 54(b), Fed. R. Civ. P.

In their response, Home Builders argue that this Court put the proverbial cart-before-the-horse by not first addressing their Article III standing argument. Relying on *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) and *Scott v. Pasadena Unified School District*, 306 F.3d 646, 654 (9th Cir. 2002), Home Builders argue that this Court must always consider an Article III standing

issue before addressing other jurisdictional issues or the merits of the case. They then, in great and expansive detail, rehash their standing arguments set forth in their previous briefs.

In its response, the USFWS notes that while it agrees that Court's June 2, 2003 Order is supported by Ninth Circuit case law, it recently realized that it had failed to raise a jurisdictional defect in its extensive briefing on Claim 7. Namely, the USFWS now argues that its December 3, 2002 Biological Opinion on the Effects of the Environmental Protection Agency's Transfer of its National Pollutant Discharge Elimination System program for Arizona to the State of Arizona (the "Transfer BO") is not a final agency action and is, thus, neither reviewable by this Court nor the Ninth Circuit. Thus, it requests that this Court dismiss Claim 7 with prejudice and enter Rule 54(b) language. USFWS's new-found argument is essentially that a biological opinion without an accompanying incidental take statement, like the Transfer BO in this case, does not carry the legal effect that the United States Supreme Court found dispositive in *Bennett v. Spear*, 520 U.S. 154 (1997). However, the USFWS also argues that if this Court finds that the Transfer BO is a reviewable final agency action, this Court should sever and transfer Claim 7.

Discussion

As an initial matter, the Court notes that the combination of Rule 21, Fed. R. Civ. P.,[1] and 28 U.S.C. § 1631[2]

[1] Rule 21, Fed. R. Civ. P., provides that "[a]ny claim against a party may be severed and proceeded with separately."

[2] 28 U.S.C. § 1631 provides as follows:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with

(Continued on following page)

allows this Court to sever and transfer Claim 7 to the Ninth Circuit while retaining jurisdiction over the remaining counts in Defenders' Second Amended Complaint. *See, e.g., United State v. County of Cook, Illinois*, 170 F.3d 1084, 1087-89 (Fed. Cir. 1999) *and Federal Deposit Ins. Corp. v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996).

Nonetheless, a case may be transferred under Section 1631 only when "(1) a court exists in which the case could have been brought originally, and (2) the interests of justice would be served by the transfer." *Clark v. Busey*, 959 F.2d 808, 812 (1992). In addition, a court must consider whether the action would have been timely filed if it had been filed in the proper forum on the date filed. *See Taylor v. Social Security Adm.*, 842 F.2d 232, 233 (9th Cir. 1988). Thus, "[t]ransfer is improper where the transferee court lacks jurisdiction and thus could not have originally heard the suit" because "Section 1631 does not itself establish jurisdiction, but rather corrects lack of jurisdiction only in cases that are actually transferred or are at least transferable." *Clark*, 959 F.2d at 812, *See also Hose v. Immigration and Naturalization Serv.*, 180 F.3d 992, 996 (9th Cir. 1999). In addition, "[t]ransfer is also improper where the plaintiff fails to make a prima facie showing of a

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such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interests of justice, transfer such action or appeal to any other court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Id.

right to relief, because the interests of justice would not be served by transfer of such a case." *Clark*, 959 F.2d at 812.

Addressing the relevant factors, the Court reaffirms its June 2, 2003 Order (Doc. # 151) in which it found that jurisdiction over Claim 7 is proper *exclusively* in the Ninth Circuit in light of 33 U.S.C. § 1369(b)(1)(D), *Public Utility Comm'r of Oregon v. Bonneville Power Admin*, 767 F.2d 622, 626 (9th Cir. 1985), and the facts of this particular challenge. Furthermore, this challenge would have been timely filed if it had been filed in the proper forum on the date filed. *See, e.g.*, 28 U.S.C. § 2401(a) (providing a six-year statute of limitations) *and Alsea Valley Alliance v. Evans*, 161 F.Supp.2d 1154, 1160-61 (D. Ore. 2001). Thus, this Court must address whether a transfer would be in the interests of justice and particularly the jurisdictional issues raised by the USFWS and the Home Builders.

With respect to Home Builders' jurisdictional arguments, the Court finds that they misread the relevant cases as neither *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) nor *Scott v. Pasadena Unified School District*, 306 F.3d 646, 654 (9th Cir. 2002) require a federal court to consider an Article III standing issue before addressing other jurisdictional issues. Rather, those cases merely indicate that a federal court must establish its *jurisdiction* before proceeding to the *merits* of a case. *See Steel Co.*, 523 U.S. at 101, *and Scott*, 306 F.3d at 653-54. In fact, the United States Supreme Court in *Steel Co.* recognized that a statutory standing question may be resolved *before* an Article III standing issue. *See Steel Co.*, 523 U.S. at 97 n.2. *See also, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-85 (1999) *and ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1140 (9th Cir. 1998) (noting that a decision of statutory standing may take

priority over an issue of Article III standing). Thus, Home Builders' argument that a federal court *must* consider an Article III standing issue before addressing other jurisdictional issues is flatly wrong.

In this matter, this Court has not transgressed the dictates of either *Steel Co.* nor *Scott* in addressing first whether the Ninth Circuit is vested by Congress with exclusive jurisdiction to decide Claim 7. Rather, it has followed the binding cases and addressed a serious and substantial jurisdictional argument, which even the USFWS did not advocate by the time of oral arguments on Claim 7, and it has *not* addressed the merits of Claim 7. Rather, this Court's decision helps promote the underlying purpose of *Steel Co.* As the Supreme Court stated, "[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co.*, 523 U.S. at 101. Both Congress and the Ninth Circuit have laid down limits on this Court's jurisdiction, which this Court must strictly observe, and Claim 7 is undoubtably beyond those limits.

Nonetheless, Home Builders' standing arguments may have some bearing with respect to whether a transfer under Section 1631 would be appropriate. After reviewing Home Builders' standing arguments, the Court notes that many, if not all, of these arguments are similar to standing arguments that could be made against Defenders' challenge to the Environmental Protection Agency's ("EPA") approval of the State of Arizona's application to administer and enforce the NPDES program for Arizona which is currently pending before the Ninth Circuit. In addition, in

reviewing the Ninth Circuit's docket on Defenders' challenge against the EPA (*see Defenders of Wildlife v. United States Environmental Protection Agency,* Ninth Circuit Case # 03-71439), the Court finds that the National Association of Home Builders has been granted leave to intervene in that challenge. Thus, this Court readily expects that either the Home Builders will raise or that the Ninth Circuit will *sua sponte* consider similar standing issues with respect to the EPA challenge. *See e.g., Steel Co.*, 523 U.S. at 97 (noting that a court can raise jurisdictional issues *sua sponte*). Considering the fact that the Ninth Circuit has *exclusive jurisdiction* over this challenge to the Transfer BO and would have decided the Article III standing issues as a matter of first impression if Defenders had properly filed this claim in that court, and considering the potential of duplication and inconsistent results on the standing issues (*see, e.g.,* June 2, 2003 Order (Doc. # 151), p. 9-10), the Court believes it appropriate to allow the Ninth Circuit to address these issues as a matter of first impression. Nonetheless, at the very least, the Court finds that Defenders' standing arguments are not "sure losers." *See, e.g., Phillips v. Seiter,* 173 F.3d 609, 611 (7th Cir. 1999). Thus, this Court believes that it would be in the interest of justice to transfer Claim 7 to the Ninth Circuit without resolving the Article III standing issues raised by Home Builders.

With respect to the USFWS' jurisdictional argument that a biological opinion without an accompanying incidental take statement, like the Transfer BO in this case, does not carry the legal effect that the United States Supreme Court found dispositive in *Bennett v. Spear,* 520 U.S. 154 (1997), the Court also finds that Defenders' position is also not a "sure loser." *See Cascadia Wildlands*

Project v. U.S. Fish & Wildlife Serv., 219 F.Supp.2d 1142, 1147-48 (D. Ore. 2002) citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997); *Pacific Coast Fed'n of Fishermen's Assoc., Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028 (9th Cir. 2001). *See also* USFWS' June 30, 2003 Response (Doc. # 170) at 1 n.2 ("In Plaintiffs' lawsuit against EPA in the Ninth Circuit, judicial review may properly include a review of the reasonableness of EPA's reliance on the analysis and recommendation of FWS' Biological Opinion in order to determine whether EPA fulfilled its obligations under § 7(a)(2) with respect to the approval of the Arizona program."). Thus, similarly, this Court believes that it would be in the interest of justice to transfer Claim 7 to the Ninth Circuit without resolving the statutory standing issue raised by the USFWS.

Finally, taking an obligatory peek at the merits of Defenders' Claim 7, the Court does not believe that Claim 7 is a "sure loser" such that a transfer would not be in the interests of justice. *See, e.g., Phillips*, 173 F.3d at 611 *and Clark*, 959 F.2d at 812. As such, the Court believes that a transfer of Claim 7 to the Ninth Circuit would be in the interests of justice. Accordingly, the Court finds that it is appropriate to sever Claim 7, pursuant to Rule 21, Fed. R. Civ. P., and transfer that claim to the Ninth Circuit, pursuant to 28 U.S.C. § 1631, while retaining jurisdiction in this Court over Defenders' remaining claims.

Conclusion

Accordingly, IT IS HEREBY ORDERED that:

1. Claim 7 of Plaintiffs' Second Amended Complaint is SEVERED from Plaintiffs' remaining claims,

and TRANSFERRED to the United States Court of Appeals for the Ninth Circuit;

2. The Clerk of the Court SHALL FORWARD a copy of this Order, this Court's June 2, 2003 Order (Doc. # 151), and a copy of Plaintiffs' Second Amended Complaint (Doc. # 42) to the Ninth Circuit;

3. The Ninth Circuit is ADVISED that this matter is a related case to the pending matter of *Defenders of Wildlife v. United States Environmental Protection Agency,* Ninth Circuit Case # 03-71439; and

4. If any party or intervenor wishes additional portions of this Court's record to be forwarded to the Ninth Circuit, it shall prepare a motion and/or stipulation along with a proposed form of order that clearly indicates which *specific* portions of the record it wishes forwarded to the Ninth Circuit. Such motion and/or stipulation along with a proposed form of order shall be submitted to the Court within ten (10) business days of the entry of this Order.

DATED this 15th day of July, 2003.

/s/ Cindy K. Jorgenson
CINDY K. JORGENSON
United States District Judge

450 F.3d 394

United States Court of Appeals,
Ninth Circuit

DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent,

NATIONAL ASSOCIATION OF HOME BUILDERS; STATE OF ARIZONA; ARIZONA CHAMBER OF COMMERCE, Intervenors.

DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ROBERT B. FLOWERS, Respondents.

Nos. 03-71439, 03-72894.

June 8, 2006.

Eric R. Glitzenstein, Esq., Meyer & Glitzenstein, Washington, DC, Vera S. Kornylak, Arizona Center for Law in the Public Interest, Tucson, AZ, for Petitioners.

David C. Shilton, Esq., U.S. Department of Justice Environment & Natural Resources Division, Christie Whitman, U.S. Environmental Protection Agency, Robert Gulley, U.S. Department of Justice Civil Division/ Appellate Staff, Washington, DC, Kevin V. Ryan, Office of the U.S. Attorney, San Jose, CA, for Respondent.

Norman D. James, Esq., Fennemore & Craig, PC, James T. Skardon, Esq., Office of the Arizona Attorney

General, Phoenix, AZ, Sonia D. Overholser, Esq., Russell S. Frye, Esq., Collier Shannon Scott, PLLC, Washington, DC, for Intervenors.

Before STEPHEN REINHARDT, DAVID R. THOMPSON, and MARSHA S. BERZON, Circuit Judges.

ORDER

The panel has voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc. Fed. R. App. P. 35. The request for panel rehearing and rehearing en banc is DENIED. Judge Kozinski's and Judge Kleinfeld's dissents from denial of en banc rehearing, and Judge Berzon's concurrence in denial of en banc rehearing, are filed concurrently herewith.

KOZINSKI, Circuit Judge, with whom Judges O'SCANNLAIN, KLEINFELD, TALLMAN, CALLAHAN and BEA join, dissenting from denial of rehearing en banc:

Less than two years ago, the Supreme Court unanimously reversed our interpretation of the National Environmental Policy Act (NEPA). *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004). Tone-deaf to the Supreme Court's message, the panel majority in this case interprets the Endangered Species Act (ESA) in precisely the same incorrect way we interpreted NEPA, dramatically expanding agencies' obligations under the law. Along the way, the majority tramples all over the Fish and Wildlife Service's (FWS) reasonable interpretation of the ESA, deliberately creates

a square inter-circuit conflict with the Fifth and D.C. Circuits, and ignores at least six prior opinions of our own court. Finally, the decision is one of considerable importance to the federal government and the states of our circuit. This is precisely the kind of case we should take en banc to set our own house in order.

Background

The Clean Water Act (CWA) instructs that the Environmental Protection Agency (EPA) "shall" transfer pollution permitting authority to a state if the state's proposal meets nine criteria. *See* 33 U.S.C. § 1342(b). None of the criteria involves consideration of endangered species. Arizona applied to take over the CWA permitting process within its borders – the forty-fifth state to do so. There is no dispute that its proposal met all nine criteria listed in the CWA.

The EPA regional office in San Francisco, however, was worried that the transfer might affect endangered species. *See* 16 U.S.C. § 1536(a)(2) (section 7(a)(2) of the ESA) (requiring federal agencies to "insure" that their actions do not jeopardize endangered species). It thus initiated consultation with FWS pursuant to ESA section 7. The regional office also stated publicly that section 7 required EPA to take endangered species into account when making a transfer decision. FWS's local office in Arizona similarly expressed concerns about the transfer.

Next, the matter was "elevated," meaning the national offices of EPA and FWS took over. After national-level

discussions, FWS reversed course, recommending immediate approval of the transfer. That agency issued a Biological Opinion (BiOp) concluding that any impact of the transfer on endangered species would be the unavoidable result of (1) Congress's decision to make ESA section 7 inapplicable to the states, and (2) Congress's decision to *require* transferring the permitting process to the states, provided the nine criteria were met (none of which included consideration of endangered species). Thus, under FWS's interpretation, the ESA was inapplicable: EPA's decision to grant the transfer could not "cause" any impact on endangered species because the decision was nondiscretionary. Two days after receiving FWS's recommendation, EPA approved the transfer.

Discussion

In striking down EPA's transfer approval, the majority makes five fundamental blunders: First, it mistakes EPA's internal deliberations for analytical inconsistency. Second, the majority fails to give appropriate deference to FWS's interpretation of the ESA. Third, the majority treats the ESA as superior to all other laws, thereby nullifying a crucial ESA regulation and forcing agencies to violate their governing statutes. Fourth, the majority contradicts the Supreme Court's recent pronouncement in *Public Citizen*. Finally, the majority dismisses the reasoned opinions of two other circuits, creating a square conflict.

1. The majority first finds that EPA's decisionmaking process was internally inconsistent. *See Defenders of Wildlife*, 420 F.3d at 959-62. On the one hand, EPA stated several times that the ESA required it to consider endangered species before approving the transfer. On the other

hand, the agency concluded it had no discretion under the CWA to take endangered species into account when making the transfer decision. Thus, the majority finds, EPA's decision "cannot stand." *Id.* at 962.

The majority makes a big fuss over the supposed internal inconsistency in EPA's reasoning, but the so-called problem is of the panel's own making. The only "inconsistency" is between the San Francisco regional office's interpretation of the ESA and the interpretation by EPA headquarters in Washington, D.C. In other words, EPA changed its mind upon further reflection at a higher level. The agency's position is that adopted by EPA at the national level; the position taken by the agency's regional office was simply overruled by the national office in Washington. There is no inconsistency in the agency's final action, which is the only one we are entitled to review. *See* 5 U.S.C. § 704.

The majority also points out that EPA's final action in this case was inconsistent with the actions it has taken when other states have applied for a transfer. *See Defenders of Wildlife*, 420 F.3d at 952 n. 3 (noting that all of EPA's transfer decisions since 1993 – six besides Arizona – have taken endangered species into account, whereas none before 1993 did). But there is no indication that EPA's deliberations in the other cases were ever elevated to the national level. As far as we know, this is the only case in which EPA's Washington, D.C. office has opined on the applicability of the ESA to the transfer of the CWA permitting process. Moreover, an agency is not locked into a particular position forever; it is entitled to change its view over time. *See Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1130 (9th Cir. 1988)

(en banc). EPA's actions in other cases are irrelevant to whether its analysis was internally inconsistent in this one.

In any event, the majority's finding of an inconsistency in EPA's analysis, if correct, should have been the end of the case; the majority should have remanded to EPA for further clarification, as the agency asked the panel to do. *See Defenders of Wildlife*, 420 F.3d at 969 n. 19. Even the majority itself says it "must remand" to EPA for clarification. *See id.* at 962. Instead, it embarks on a 17-page boondoggle, conducting the very analysis that EPA should have had an opportunity to conduct for itself. *See Gonzales v. Thomas*, ___ U.S. ___, ___, 126 S.Ct. 1613, 1614, 164 L.Ed.2d 358 (2006) ("The Ninth Circuit's failure to remand is legally erroneous, and that error is 'obvious in light of *Ventura*,' itself a summary reversal.").

2. In faulting EPA for its alleged internal inconsistencies, the majority misconstrues the way the ESA was meant to operate. Under the ESA, a federal agency must consider whether its action "may affect" endangered species. 50 C.F.R. § 402.14(a). If the agency thinks endangered species *might* be affected, it must ask FWS whether its supposition is correct – whether its action *would*, in fact, affect endangered species – and, if so, what the impact on endangered species will be. *See id.; id.* §§ 402.14(e), (h). Then, FWS must respond by issuing a BiOp that the agency must take into account before making its decision. *See id.* §§ 402.14(e), 402.15(a).

In this case, EPA was initially concerned that its approval of Arizona's transfer application might affect endangered species. EPA does not administer the ESA, so

it doesn't have the expertise to know for sure. *See Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998). In order to find out whether its transfer approval *would*, in fact, affect endangered species, EPA did exactly what it was supposed to do: It asked FWS, the agency that *is* charged with administering the ESA. *See United States v. McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998). And FWS did exactly what *it* was supposed to do: It responded with a BiOp informing EPA that its approval would not, in fact, affect endangered species. *See* p. 395 *supra*. With this advice from the congressionally designated experts in hand, EPA decided that its initial concerns were unfounded and that it could go forward with the transfer approval.

The majority finds this perfectly logical sequence of events to be "nonsensical" and impermissible. *See Defenders of Wildlife*, 420 F.3d at 961. According to the majority, once EPA expressed concern that its action might affect endangered species, it had already conclusively determined that its decision was governed by the ESA. *See id.* In other words, under the majority's interpretation, once FWS is consulted for guidance, it is precluded from ever determining that the ESA is inapplicable.

With all due respect to my colleagues, it is *their* conclusion that is nonsensical, undermining the entire consultative process that the ESA establishes and striking down FWS's perfectly reasonable interpretation of the ESA. The majority forgets that FWS is the agency charged with administering the ESA, and that its interpretation of the ESA is thus entitled to *Chevron* deference. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703, 115 S.Ct. 2407, 132 L.Ed.2d 597

(1995) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Here, FWS determined – after careful study at the local and national levels – that the ESA was inapplicable to EPA's decision, and it issued a BiOp relaying its conclusion to the EPA. The majority cannot overturn FWS's statutory interpretation simply because it disagrees with it.

3. Having decided to conduct – on its own – the very analysis that FWS already conducted, the majority comes out the other way, getting it flatly wrong. The majority concludes that section 7 of the ESA required EPA to take endangered species into account when making the transfer decision, notwithstanding the plain contrary language of the CWA. It thus transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute. *See Defenders of Wildlife*, 420 F.3d at 963-67.

Further, the majority handily disposes of a regulation issued by FWS that was supposed to limit ESA's applicability to "actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added). Unable to reconcile this regulation with its newly expansive interpretation of the ESA's mandate, the majority simply finds that the word "discretionary" in the regulation is meaningless; the regulation, announces the majority, is "coterminous" with the statute it interprets. *See Defenders of Wildlife*, 420 F.3d at 967-69. In other words, despite FWS's regulation, the majority finds that the ESA applies to anything "authorized, funded, or

carried out" by a federal agency, 16 U.S.C. § 1536(a)(2), whether discretionary or not. Again, the majority fails to give FWS the deference it is due.[1]

In his dissent, Judge Thompson succinctly identifies the serious flaws in the majority's analysis. He points out that EPA had no authority under the CWA to consider endangered species when making the transfer decision. And he explains that the majority's interpretation of the scope of ESA's applicability contradicts our precedents: "[W]e have consistently recognized that an agency may have decisionmaking authority and yet not be empowered . . . to act to protect endangered species." *Defenders of Wildlife*, 420 F.3d at 979-80 (Thompson, J., dissenting) (citing six Ninth Circuit precedents that contradict the majority's holding). Once the nine criteria were met, the dissent concludes, the CWA mandated the transfer; nothing in ESA section 7 allows – let alone requires – the EPA to ignore the clear language of the CWA. *See id.* at 980-81.[2]

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[1] The majority points out that "§ 402.03 is a regulation, *not* a statute," *Defenders of Wildlife*, 420 F.3d at 969 n. 19, as if that somehow robs its interpretation of deference. But FWS issued the regulation in question. *See id.* at 951 n. 1. Its interpretation of the regulation is therefore also entitled to "substantial deference." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) (internal quotation marks omitted).

[2] We cannot presume that Congress repealed the CWA's categorical mandate sub silentio, simply by passing the ESA. *See* n.4 *infra*. But even if we were inclined to believe, as the panel majority does, that the CWA and ESA need to be reconciled, FWS's regulation is a perfectly plausible way to do so: By limiting the ESA's applicability to "discretionary" agency actions, 50 C.F.R. § 402.03, the regulation avoids the supposed conflict the majority has created between the ESA and governing statutes – like the CWA – that mandate agency action.

4. The majority's superfluous holding – that ESA forces an agency to consider the impact of its decisions on endangered species, even when the agency's governing statute precludes it from doing so – also flies in the face of *Public Citizen*, where the Supreme Court unanimously reversed our interpretation of NEPA. *See* 541 U.S. at 770, 773, 124 S.Ct. 2204.

The issue in *Public Citizen* was whether NEPA "require[s] the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers" before deciding whether to grant registration to Mexican trucks. *Id.* at 756, 124 S.Ct. 2204. NEPA's language, regarding when and how an agency must take into account the impact of its actions on the environment, is similar to ESA's language regarding endangered species. *Compare* 42 U.S.C. § 4332(2)(C) *and* 40 C.F.R. § 1508.18, *with* 16 U.S.C. § 1536(a)(2) *and* 50 C.F.R. § 402.03. And the FMCSA's governing statute, like the CWA, instructs that the agency "shall" grant registration to any carrier meeting certain criteria, none of which involves environmental concerns. *See* 49 U.S.C. § 13902(a)(1).

In upholding the agency's decision to grant registration without taking into account the environmental impact of Mexican trucks, the Supreme Court stressed that "FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are willing and able to comply with the applicable . . . requirements. FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety." *Id.* at 758-59, 124

S.Ct. 2204 (internal quotation marks and citation omitted). The Supreme Court concluded that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect.[3] Hence, under NEPA ... the agency need not consider these effects.... [B]ecause FMCSA has no discretion to prevent the entry of Mexican trucks, [it] did not need to consider the environmental effects arising from the entry." *Public Citizen*, 541 U.S. at 770, 124 S.Ct. 2204.

The Supreme Court's holding in *Public Citizen* applies equally to this case: Because EPA had no discretion under the CWA to prevent the transfer of permitting authority to Arizona, it did not need to consider the transfer's effects on endangered species. The majority's contrary conclusion cannot be reconciled with the Supreme Court's unanimous decision.[4]

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[3] The majority quotes this sentence verbatim from *Public Citizen. Defenders of Wildlife*, 420 F.3d at 963. But, instead of recognizing that this language controls the case, the majority uses it as a springboard to launch into its unnecessary analysis.

[4] Judge Berzon's concurrence dismisses *Public Citizen* as "entirely uninformative," concurrence at 406, by labeling NEPA as a "strictly procedural statute" and the ESA as a "partially substantive statute," *id.* at ___. What Judge Berzon must be arguing is that the ESA effected a sub silentio repeal of EPA's categorical obligation under the CWA, so that the statutory "shall" was foreshortened to "may." There is absolutely no indication that Congress meant to do any such thing and we should long hesitate before concluding that it did this unknowingly. *See Watt v. Alaska*, 451 U.S. 259, 267, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981) (noting the maxim of statutory interpretation that "repeals by implication are not favored," and stating that "[t]he intention of the legislature to repeal must be clear and manifest" (internal quotation marks omitted)); *id.* at 280, 101 S.Ct. 1673 (Stewart, J., dissenting) ("The

(Continued on following page)

5. Finally, the majority opinion squarely, and admittedly, conflicts with the Fifth and D.C. Circuits. *See Defenders of Wildlife*, 420 F.3d at 970. In *American Forest & Paper Ass'n v. EPA*, the Fifth Circuit considered precisely the same question at issue in this case: whether the ESA imposes its own criteria on EPA's decision to transfer

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maxim that 'repeals by implication are disfavored' has force when the argument is made that a general statute . . . eviscerates an earlier and more specific enactment of limited coverage but without an indication of congressional intent to do so."); *see also Ex parte Yerger*, 8 Wall. 85, 105, 19 L.Ed. 332 (1869) ("Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act.").

If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency. We should be particularly chary of holding that the ESA made such sweeping changes when the agency charged with implementing the statute has adopted a regulation allowing the ESA to coexist peacefully with all categorical mandates. *See* 50 C.F.R. § 402.03; n.2 *supra*. There is no justification for nullifying countless congressional directives by casting aside the agency's authoritative interpretation of the ESA, formally adopted pursuant to notice and comment procedures.

Unless one buys into the dubious proposition that Congress somehow repealed the term "shall" in 33 U.S.C. § 1342(b), this case is a carbon copy of *Public Citizen*. "Shall" means shall here as it did there; thus EPA has no discretion to deny the transfer once the nine statutory criteria are satisfied. *See* Kleinfeld dissent at 401. Just as in *Public Citizen*, the agency's action – granting the transfer – is not a legally relevant "cause" of any impact on endangered species because the agency had no discretion in the matter once the statutory criteria were met. *See* 541 U.S. at 769, 124 S.Ct. 2204.

When we are confronted with a question of statutory interpretation, we must take into account the Supreme Court's previous interpretation of highly similar words in an analogous situation, even if the two cases are not "identical." Concurrence at 404. It is no doubt symptomatic of my "myopic" view of the world, *id.* at 405, but I believe we should treat Supreme Court pronouncements as binding, not as mere hazards to navigation.

CWA permitting authority to a state – in that case, Louisiana – or whether the nine factors enumerated in the CWA are, as the plain text of the statute requires, an exhaustive list that precludes consideration of endangered species. *See* 137 F.3d 291, 297-99 (5th Cir. 1998).

In *American Forest*, unlike in this case, the EPA *wanted* to condition the transfer of the permitting process on protection of endangered species. But the Fifth Circuit determined – in direct contradiction to the majority here – that "[t]he [CWA's] plain language directs EPA to approve proposed state programs that meet the enumerated criteria; particularly in light of the command 'shall approve,' [the CWA] cannot be construed to allow EPA to expand the list of permitting requirements" to include consideration of endangered species. *Id.* at 298. Further, when EPA argued that the ESA compelled it to consider endangered species, the Fifth Circuit interpreted section 7(a)(2) of the ESA to mean exactly the opposite of the majority's holding:

> [I]f EPA lacks the power to add additional criteria to CWA § 402(b), nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA . . . confers no substantive powers.
>
> . . . [T]he ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction. *The upshot is that EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA.*

Id. at 298-99 (second emphasis added) (footnote omitted). In recognition of the circuit split it is creating, the majority dismisses the Fifth Circuit's reasoning out of hand,

calling it a "fundamental misconception" and "simply incorrect." *Defenders of Wildlife*, 420 F.3d at 971.

The D.C. Circuit has also considered the ESA's power to override the mandate of an agency's governing statute. *See Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 32-33 (D.C. Cir. 1992). Under the Federal Power Act, the Federal Energy Regulatory Commission (FERC) was precluded from amending the annual licenses it gave to a hydroelectric plant, and thus could not insert wildlife protective conditions into the license upon renewal. *See id.* at 32. Petitioners alleged, however, that notwithstanding the Federal Power Act, section 7 of the ESA required FERC to impose such conditions on the licensee. *See id.* at 33. The D.C. Circuit disagreed:

> The Trust reads section 7 essentially to oblige the Commission to do "whatever it takes" to protect the threatened and endangered species that inhabit the Platte River basin; any limitations on FERC's authority contained in the [Federal Power Act] are implicitly superseded by this general command. . . . We think the Trust's interpretation of the ESA is farfetched. As the Commission explained, the statute directs agencies to "utilize their authorities" to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act.

Id. at 34. Like the Fifth Circuit, the D.C. Circuit's interpretation of the ESA directly contradicts the majority's holding in this case. But again, the majority dismisses its

sister circuit's reasoning as "cursory" and unpersuasive. *Defenders of Wildlife*, 420 F.3d at 971.[5]

* * *

The majority's opinion has far-reaching effects on the scope of the Endangered Species Act. Its holding – that the ESA imposes an affirmative duty on a federal agency to protect endangered species, even in the face of a governing statute that explicitly precludes the agency from doing so – contradicts FWS's statutory interpretation, ignores the very recent instructions of the Supreme Court, and creates a conflict with two other circuits. And for what? All EPA asks for is to have an opportunity to clarify its position on the issue, and explain why its decision to transfer permitting authority to Arizona made sense. Even more recent Supreme Court instructions emphatically command us to do just that. *See Thomas*, 126 S.Ct. at 1614-15. The

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[5] The majority concedes the conflict with the Fifth and D.C. Circuits but claims it is merely taking sides in a preexisting conflict, because the First and Eighth Circuits have issued opinions agreeing with its position. *See id.* at 970-71 (citing *Conservation Law Found. v. Andrus*, 623 F.2d 712 (1st Cir. 1979), and *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989)). The First and Eighth Circuit cases, however, do not support the majority's position. Both cases addressed situations where the governing statute and the ESA were complementary, not where the governing statute *precluded* consideration of endangered species as the CWA does. *See Andrus*, 623 F.2d at 715 ("[T]he assumption that the ESA and OCSLA are mutually exclusive . . . is incorrect – the standards of these two acts are complementary, and the ESA will continue to apply of its own force. . . ."); *Defenders of Wildlife*, 882 F.2d at 1299 ("FIFRA does not exempt the EPA from complying with ESA requirements when the EPA registers pesticides."). Neither circuit held, as the majority in this case does, that the ESA trumps the governing statute, or that the ESA applies when the governing statute precludes agency discretion regarding endangered species. The inter-circuit conflict is entirely of the panel's own making.

majority's stubborn refusal to give the agency that opportunity before vacating its transfer decision has put us in a highly precarious position vis-à-vis the executive branch, the states, the other circuits and the Supreme Court. We should have taken the case en banc and fixed the problems ourselves.

KLEINFELD, Circuit Judge, dissenting from denial of rehearing en banc:

I join in Judge Kozinski's thorough dissent, but write separately to show just how simple this case should have been. As Judge Thompson pointed out in his dissent from the panel's decision, the statute is mandatory. Congress commands that the agency "shall approve" state programs "unless" one or more of nine conditions are not met. The "shall/unless" formula makes the nine condition list exclusive, and courts cannot add conditions to the list.[1] The language has the look of a careful legislative compromise necessary to get the votes for passage.[2] The statute leaves no room for conditions ten, eleven, or whatever else we may think Congress should have added.[3]

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[1] *See*, e.g., *Department of Transp. v. Public Citizen*, 541 U.S. 752, 767, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2005).

[2] *Cf. Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 (9th Cir. 2000) ("Legislation often results from a delicate compromise among competing interests and concerns. If we were to 'fully effectuate' what we take to be the underlying policy of the legislation, without careful attention to the qualifying words in the statute, then we would be overturning the nuanced compromise in the legislation, and substituting our own cruder, less responsive mandate for the law that was actually passed.").

[3] *Cf. Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992).

BERZON, Circuit Judge, concurring in the order denying the petition for rehearing en banc:

I.

I begin by explaining why I am writing this concurrence: A practice has developed in this court of writing dissents from denial of rehearing en banc consideration as a matter of routine. Those dissents sometimes read more like petitions for writ of certiorari than judicial opinions of any stripe. They pose a dilemma for those who believe the original opinion correct, as they may raise issues not addressed by that opinion because not articulated by the parties before the petition for rehearing stage – or ever.

The result, absent some response, is a distorted presentation of the issues in the case, creating the impression of rampant error in the original panel opinion although a majority – often a decisive majority – of the active members of the court either perceived no error or thought the case not one of much consequence. At the same time, answering the newly raised contentions by amending the panel opinion is usually not feasible. The court has voted not to rehear en banc the original opinion and ought not to have to accept a new version without a second opportunity to determine whether the opinion deserves en banc consideration. The result, quite obviously, could be a form of infinite regression which precludes us from ever finally deciding the case.

In this case, Judge Kozinski writes an impassioned dissent from denial of en banc consideration, accusing the panel majority of all manner of judicial perfidy. The problem is that his accusations are either flat wrong or indicate a misunderstanding of the holdings in the panel

opinion. As the author of the panel opinion, I have no choice but to try to set the record straight. So as to avoid establishing a new tradition of group *concurrences* in denial of en banc to match the group dissents, I intentionally write for myself alone, without the concurrence of any of my colleagues.

II.

The majority opinion in *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), if carefully read, contains responses to most of the baseless attacks that Judge Kozinski has dropped upon it. Among other errors in the dissent from denial of rehearing en banc that are exposed in the opinion are:

(1) the notion that the national Environmental Protection Agency (EPA) did not endorse in this case the position that the Endangered Species Act requires consultation with regard to Clean Water Act permitting decisions, Kozinski Dissent at 6290-91, when it did, *see Defenders of Wildlife*, 420 F.3d at 959-60;[1]

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[1] Judge Kozinski insists that "[a]ll EPA asks for is to have an opportunity to clarify its position on the issue, and explain why its decision to transfer permitting authority to Arizona made sense." Kozinski Dissent at 401; *see also id.* at 396. In fact, in its petition for rehearing en banc the EPA quarreled at length with the merits of the majority opinion, and, building upon Judge Thompson's dissent, asserted an intracircuit conflict. The possibility of a remand for clarification of the agency's interpretation of the statute is mentioned in a single footnote and only with regard to the portion of the opinion that discusses EPA's *prior inconsistent* positions (an inconsistency which, unlike Judge Kozinski, the EPA does not dispute).

Furthermore, Judge Kozinski's citation to *Gonzales v. Thomas*, ___ U.S. ___, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006) is inapposite. In

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(2) the repeated assertion that section 401 of the Clean Water Act "precludes" application of the plain language of section 7 of the after-enacted Endangered Species Act, Kozinski Dissent at 6294, when the pertinent part of the Clean Water Act does not mention the Endangered Species Act at all, *see Defenders of Wildlife*, 420 F.3d at 963-69;

(3) the insistence that the Endangered Species Act does not apply to *any* action "authorized, funded, or carried out" by a federal agency, Kozinski Dissent at 6293, when that is exactly what section 7(a)(2) says, in a perfectly clear statutory requirement that may not be contravened by an interpretative regulation, *see Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 & n. 9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Defenders of Wildlife*, 420 F.3d at 969;

(4) the allegation that there was not a preexisting circuit split, even though *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989), and *Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir. 1979), held that agencies *do* have to comply with the Endangered Species

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Thomas, the Supreme Court faulted this court for not giving the agency an opportunity to decide an issue in the first instance. Here, in contrast, the EPA did decide that a transfer was appropriate and that it did not have the authority to consider the impact on endangered and threatened species of the transfer decision. We disagreed with both conclusions. Now, the EPA wants to decide the issue *again*, explaining its reasoning once more. *INS v. Ventura*, 537 U.S. 12, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002), does not require that an agency have *two* chances to consider a factual or legal question before appellate review, only one. Further, the majority opinion ultimately *does* remand the transfer decision for consideration on proper legal grounds.

Act *as well as* their own governing statutes, *see Defenders of Wildlife*, 420 F.3d at 970;

(5) the contention that the analysis contained in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*, 962 F.2d 27, 34 (D.C. Cir. 1992), and *American Forest & Paper Ass'n v. U.S. Environmental Protection Agency*, 137 F.3d 291, 293-94 (5th Cir. 1998), is more accurate than the analysis in *Defenders of Wildlife*, even though those cases rely on the language of section 7(a)(1) and disregard the quite different wording of section 7(a)(2), *see Defenders of Wildlife*, 420 F.3d at 970-71;

(6) the statement that *American Forest* decided precisely the same question addressed in *Defenders of Wildlife*, Kozinski Dissent at 400, when the issue in that case was not what factors the EPA must consider in making the transfer decision but whether the EPA must impose Endangered Species Act requirements on the states as a condition of transfer;

(7) the accusation that the panel opinion "ignor[ed] at least six prior opinions of our own court," Kozinski Dissent at 395, when the panel opinion discusses and distinguishes those opinions at some length, *Defenders of Wildlife*, 420 F.3d at 967-69; and

(8) the assertion that the Fish and Wildlife Service's (FWS) position regarding the impact of the transfer is entitled to *Chevron* deference, Kozinski Dissent at 398, even though that position required, in part, an interpretation of the Clean Water Act, over which the FWS has no

regulatory power, 33 U.S.C. § 1251(d) (designating the Administrator of the EPA to "administer this chapter").[2]

There is, however, one point upon which Judge Kozinski places much stock – perhaps more than on any other – that is not addressed in the majority panel opinion. The reason for the lapse is not that Judge Kozinski is correct in his emphatic assertions regarding *Department of Transportation v. Public Citizen*, 541 U.S. 752, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004), but that he is so wrong that there was no reason we would have addressed his argument in the first instance.

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[2] Judge Kozinski also insists that the majority opinion "presume[s] that Congress repealed the CWA's categorical mandate sub silentio, simply by passing the ESA." Kozinski Dissent at 398 n. 2. As the opinion makes clear, we do not see the Endangered Species Act as *repealing* any part of the Clean Water Act. Rather, the Endangered Species Act, a later-enacted statute, *adds* one requirement to the list of considerations under the Clean Water Act permitting transfer provision. The repeal accusation places entirely too much weight on the word "shall," supposing that it shuts out any and all additional federal requirements concerning federal decision-making.

Moreover, if the precept disfavoring repeals by implication does apply, the very definite, unqualified language of the after-enacted Endangered Species Act must still prevail. *See United Ass'n of Journeymen v. Reno*, 73 F.3d 1134, 1140 (D.C. Cir. 1996) (finding that a specific, detailed provision precludes operation of an earlier-enacted general statute that would otherwise apply); *id.* at 1142 (Edwards, J., dissenting) (noting that the specific provision did not mention the other provision or statute at issue in the case); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) (noting that Congress expressly limited the Endangered Species Act's "broad sweep" in certain, enumerated situations, and because of such express limitations "we must presume that these were the only 'hardship cases' Congress intended to exempt").

III.

Judge Kozinski boldly asserts that the panel opinion "flies in the face of *Public Citizen*." The assertion that the two cases are identical, even similar, misunderstands both *Public Citizen* and *Defenders of Wildlife* itself, while ignoring a Supreme Court case that *is* closely on point, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

The Endangered Species Act, at issue in *Defenders of Wildlife*, sets a substantive requirement that all agencies must follow. As *Tennessee Valley Authority* states, the Endangered Species Act "*affirmatively command*[s] all federal agencies 'to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence' of an endangered species." *Defenders of Wildlife*, 420 F.3d at 964 (quoting *Tenn. Valley Auth.*, 437 U.S. at 173, 98 S.Ct. 2279).

Public Citizen concerned an entirely different environmental statute, the National Environmental Policy Act (NEPA). NEPA, in contrast to the Endangered Species Act, establishes only the requirement that environmental impact must be *considered* when making certain federal decisions. *See* 42 U.S.C. § 4332(2)(C) (requiring a statement of environmental impact for "major Federal actions" but requiring no federal response to any environmental impact demonstrated); *Public Citizen*, 541 U.S. at 756-57, 124 S.Ct. 2204 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)).

Public Citizen concerned a congressionally enacted moratorium prohibiting certain motor carriers from obtaining operating authority within the United States

and authorizing the President to lift the moratorium. *Id.* at 759, 124 S.Ct. 2204. In 2002, the President lifted the moratorium with respect to Mexican motor carriers. *Id.* at 762, 124 S.Ct. 2204. The Federal Motor Carrier Safety Administration, the agency with authority to grant registration to foreign motor carriers, issued rules for monitoring Mexican motor carriers. *Id.* Petitioners sued, claiming that the rules were promulgated in violation of NEPA and the Clean Air Act. *Id.*

The Supreme Court rejected petitioners' arguments. Pertinent here is the Court's discussion of NEPA, as that is the portion of *Public Citizen* with which Judge Kozinski claims *Defenders of Wildlife* is in conflict.[3] Critically for present purposes, NEPA is a procedural statute *only, see id.* at 756, 124 S.Ct. 2204; it provides specific steps that must be taken before making decisions with regard to major actions that the agency has authority to undertake, but does not direct that environmental considerations actually influence the action.[4] In contrast, the Endangered

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[3] It is worth noting also that, as *Public Citizen* recognized, NEPA requires an agency to provide an Environmental Impact Statement only "if it will be undertaking a '*major* Federal actio[n],' which 'significantly affect[s] the quality of the human environment.'" *Id.* at 763, 124 S.Ct. 2204 (quoting 42 U.S.C. § 4332(2)(C)) (emphasis added). There is no requirement of a "*major* Federal actio[n]" in the Endangered Species Act; any "action authorized, funded, or carried out by the agency" will do. 16 U.S.C. § 1536(a)(2).

[4] 42 U.S.C. 4332(2)(C) reads:

> [A]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on – (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and

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Species Act provides that in taking *any* action authorized, funded, or carried out by the agency, *any* agency must meet a substantive requirement – it must not threaten listed species. *See Hill*, 437 U.S. at 188 n. 34, 98 S.Ct. 2279 (distinguishing NEPA, as a procedural statute, from the Endangered Species Act, as a substantive statute).

Public Citizen considered whether the Department of Transportation (DOT) was required to "take into account the environmental effects of increased cross-border operations of Mexican motor carriers." *Id.* at 765, 124 S.Ct. 2204. The Supreme Court held that the agency was not required to do so, because it "has no ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican carriers from operating within the United States." *Id.* at 766, 124 S.Ct. 2204. In other words, NEPA's purposes would not be served by requiring the agency to engage in NEPA's procedural steps with regard to a decision it could not make. *Id.* at 769, 124 S.Ct. 2204. Because the DOT in *Public Citizen* had no authority to determine whether to allow in the Mexican trucks, it had no occasion under NEPA to consider environmental factors in making such a decision.

Here, the central question concerns whether EPA has a substantive responsibility and authority, created by the Endangered Species Act itself, to refrain from taking action that threatens listed species. If it does, then there is nothing futile about considering whether endangered

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enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

species will be affected, for that is the inquiry the statute dictates.

The difference between NEPA, a strictly procedural statute, and the Endangered Species Act, a partially substantive statute, is critical. *Public Citizen* determined because there was *no* statutory authority for the Department of Transportation to ban the Mexican trucks for environmental reasons, there were therefore no procedures mandated by NEPA to inform the phantom decision. Only the most myopic observer could fail to see the difference between a statute that simply provides a procedure to inform decisionmaking processes governed entirely by other statutes from one that sets a *substantive* decisionmaking requirement.

The central dispute in this case concerns the reach of the substantive mandate of section 7 of the Endangered Species Act. The question in this case is one specific to the Endangered Species Act and depends only on the particular language, history, and administrative application of that statute. As to that question, *Public Citizen*, a case that has nothing to do with the Endangered Species Act here at issue and that construed a statute with *no* substantive import, emphatically does *not* "appl[y] equally to this case." Kozinski Dissent at ___. Instead, *Public Citizen* is entirely uninformative on the key legal point in this case.

STATUTES

33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

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33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

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33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked,

modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to

establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume

of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State

permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS. – A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of –

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire

phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested

within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard

imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(*l*) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or

treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if –

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if –

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(*o*) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if –

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit

may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this

section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such

discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of –

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges

described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

16 U.S.C. § 1531. Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that –

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to –

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

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16 U.S.C. § 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present

in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A) –

> (i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth –
>
> > (I) the reasons why a longer period is required,
> >
> > (II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation

under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that –

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that –

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of Title 5.

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no

case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to –

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means

(i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary –

(A) determine that the Federal agency concerned and the exemption applicant have –

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing –

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of

alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection

(g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person –

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that –

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action –

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless –

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of

State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(*l*) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted

with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section –

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

REGULATIONS

40 C.F.R. § 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National Pollutant Discharge Elimination System – NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator will approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program.

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the

State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under § 123.23(b) for activities within the scope of the newly approved program. The authorized State will retain jurisdiction over its existing permits as described in paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the State program must prohibit all point source discharges of

pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

NOTE: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

(i) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

NOTE: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

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40 C.F.R. § 123.21 Elements of a program submission.

(a) Any State that seeks to administer a program under this part shall submit to the Administrator at least three copies of a program submission. The submission shall contain the following:

(1) A letter from the Governor of the State (or in the case of an Indian Tribe in accordance with § 123.33(b), the Tribal authority exercising powers substantially similar to those of a State Governor) requesting program approval;

(2) A complete program description, as required by § 123.22, describing how the State intends to carry out its responsibilities under this part;

(3) An Attorney General's statement as required by § 123.23;

(4) A Memorandum of Agreement with the Regional Administrator as required by § 123.24;

(5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures;

(b)(1) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's submission is complete, the statutory review period (i.e., the period of time allotted for formal EPA review of a proposed State program under CWA) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

(2) In the case of an Indian Tribe eligible under § 123.33(b), EPA shall take into consideration the contents of the Tribe's request submitted under § 123.32, in determining if the program submission required by § 123.21(a) is complete.

(c) If the State's submission is materially changed during the statutory review period, the statutory review period shall begin again upon receipt of the revised submission.

(d) The State and EPA may extend the statutory review period by agreement.

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40 C.F.R. § 123.22 Program description.

Any State that seeks to administer a program under this part shall submit a description of the program it proposes to administer in lieu of the Federal program under State law or under an interstate compact. The program description shall include:

(a) A description in narrative form of the scope, structure, coverage and processes of the State program.

(b) A description (including organization charts) of the organization and structure of the State agency or agencies which will have responsibility for administering the program, including the information listed below. If more than one agency is responsible for administration of a program, each agency must have statewide jurisdiction over a class of activities. The responsibilities of each agency must be delineated, their procedures for coordination set forth, and an agency may be designated as a "lead agency" to facilitate communications between EPA and the State agencies having program responsibility. If the State proposes to administer a program of greater scope of coverage than is required by Federal law, the information provided under this paragraph shall indicate the resources dedicated to administering the Federally required portion of the program.

(1) A description of the State agency staff who will carry out the State program, including the number, occupations, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program.

(2) An itemization of the estimated costs of establishing and administering the program for the first two years after approval, including cost of the personnel listed in paragraph (b)(1) of this section, cost of administrative support, and cost of technical support.

(3) An itemization of the sources and amounts of funding, including an estimate of Federal grant money, available to the State Director for the first two years after approval to meet the costs listed in paragraph (b)(2) of this section, identifying any restrictions or limitations upon this funding.

(c) A description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures,

(d) Copies of the permit form(s), application form(s), and reporting form(s) the State intends to employ in its program. Forms used by States need not be identical to the forms used by EPA but should require the same basic information, except that State NPDES programs are required to use standard Discharge Monitoring Reports (DMR). The State need not provide copies of uniform national forms it intends to use but should note its intention to use such forms.

NOTE: States are encouraged to use uniform national forms established by the Administrator. If uniform national forms are used, they may be modified to include the State Agency's name, address, logo, and other similar information, as appropriate, in place of EPA's.

(e) A complete description of the State's compliance tracking and enforcement program.

(f) In the case of Indian Tribes eligible under § 123.33(b), if a State has been authorized by EPA to issue permits on the Federal Indian reservation in accordance with § 123.23(b), a description of how responsibility for pending permit applications, existing permits, and supporting files will be transferred from the State to the eligible Indian Tribe. To the maximum extent practicable, this should include a Memorandum of Agreement negotiated between the State and the Indian Tribe addressing the arrangements for such transfer.

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40 C.F.R. § 123.23 Attorney General's statement.

(a) Any State that seeks to administer a program under this part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independent legal counsel) that the laws of the State, or an interstate compact, provide adequate authority to carry out the program described under § 123.22 and to meet the requirements of this part. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the State agency in court on all matters pertaining to the State program.

NOTE: EPA will supply States with an Attorney General's statement format on request.

(b) If a State (which is not an Indian Tribe) seeks authority over activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.

(c) The Attorney General's statement shall certify that the State has adequate legal authority to issue and enforce general permits if the State seeks to implement the general permit program under § 122.28.

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40 C.F.R. § 123.24 Memorandum of Agreement with the Regional Administrator.

(a) Any State that seeks to administer a program under this part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's statutory oversight responsibility.

(b) The Memorandum of Agreement shall include the following:

(1)(i) Provisions for the prompt transfer from EPA to the State of pending permit applications and any other information relevant to program operation not already in the possession of the State Director (e.g., support files for permit issuance, compliance reports, etc.). If existing permits are transferred from EPA to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring the administration of these permits. If a State lacks the authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.

NOTE: For example, EPA and the State and the permittee could agree that the State would issue a permit(s) identical to

the outstanding Federal permit which would simultaneously be terminated.

(ii) Where a State has been authorized by EPA to issue permits in accordance with § 123.23(b) on the Federal Indian reservation of the Indian Tribe seeking program approval, provisions describing how the transfer of pending permit applications, permits, and any other information relevant to the program operation not already in the possession of the Indian Tribe (support files for permit issuance, compliance reports, etc.) will be accomplished.

(2) Provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the Regional Administrator for review, comment and, where applicable, objection.

(3) Provisions specifying the frequency and content of reports, documents and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports where appropriate. These procedures shall implement the requirements of § 123.43.

(4) Provisions on the State's compliance monitoring and enforcement program, including:

(i) Provisions for coordination of compliance monitoring activities by the State and by EPA. These may specify the basis on which the Regional Administrator will select facilities or activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

(ii) Procedures to assure coordination of enforcement activities.

(5) When appropriate, provisions for joint processing of permits by the State and EPA for facilities or activities which require permits from both EPA and the State under different programs. (See § 124.4.)

NOTE: To promote efficiency and to avoid duplication and inconsistency, States are encouraged to enter into joint processing agreements with EPA for permit issuance. Likewise, States are encouraged (but not required) to considered steps to coordinate or consolidate their own permit programs and activities.

(6) Provisions for modification of the Memorandum of Agreement in accordance with this part.

(c) The Memorandum of Agreement, the annual program grant and the State/EPA Agreement should be consistent. If the State/EPA Agreement indicates that a change is needed in the Memorandum of Agreement, the Memorandum of Agreement may be amended through the procedures set forth in this part. The State/EPA Agreement may not override the Memorandum of Agreement.

NOTE: Detailed program priorities and specific arrangements for EPA support of the State program will change and are therefore more appropriately negotiated in the context of annual agreements rather than in the MOA. However, it may still be appropriate to specify in the MOA the basis for such detailed agreements, e.g., a provision in the MOA specifying that EPA will select facilities in the State for inspection annually as part of the State/EPA agreement.

(d) The Memorandum of Agreement shall also specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits under sections 402(d)(3), (e) or (f) of CWA. While the Regional Administrator and the State may agree to waive EPA review of certain "classes or categories" of permits, no waiver of review may be granted for the following classes or categories:

(1) Discharges into the territorial sea;

(2) Discharges which may affect the waters of a State other than the one in which the discharge originates;

(3) Discharges proposed to be regulated by general permits (see § 122.28);

(4) Discharges from publicly owned treatment works with a daily average discharge exceeding 1 million gallons per day;

(5) Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day;

(6) Discharges from any major discharger or from any discharger within any of the 21 industrial categories listed in Appendix A to Part 122;

(7) Discharges from other sources with a daily average discharge exceeding 0.5 (one-half) million gallons per day, except that EPA review of permits for discharges of non-process wastewater may be waived regardless of flow.

(e) Whenever a waiver is granted under paragraph (d) of this section, the Memorandum of Agreement shall contain:

(1) A statement that the Regional Administrator retains the right to terminate the waiver as to future permit actions, in whole or in part, at any time by sending the State Director written notice of termination; and

(2) A statement that the State shall supply EPA with copies of final permits.

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40 C.F.R. § 123.44 EPA Review of and objections to State permits.

(a)(1) The Memorandum of Agreement shall provide a period of time (up to 90 days from receipt of proposed permits) to which the Regional Administrator may make general comments upon, objections to, or recommendations with respect to proposed permits. EPA reserves the right to take 90 days to supply specific grounds for objection, notwithstanding any shorter period specified in the Memorandum of Agreement, when a general objection is filed within the review period specified in the Memorandum of Agreement. The Regional Administrator shall send a copy of any comment, objection or recommendation to the permit applicant.

(2) In the case of general permits, EPA shall have 90 days from the date of receipt of the proposed general permit to comment upon, object to or make recommendations with respect to the proposed general permit, and is not bound by any shorter time limits set by the Memorandum of Agreement for general comments, objections or recommendations.

(b)(1) Within the period of time provided under the Memorandum of Agreement for making general comments upon, objections to or recommendations with respect to proposed permits, the Regional Administrator shall notify the State Director of any objection to issuance of a proposed permit (except as provided in paragraph (a)(2) of this section for proposed general permits). This notification shall set forth in writing the general nature of the objection.

(2) Within 90 days following receipt of a proposed permit to which he or she has objected under paragraph (b)(1) of this section, or in the case of general permits within 90 days after receipt of the proposed general permit, the Regional Administrator shall set forth in writing and transmit to the State Director:

(i) A statement of the reasons for the objection (including the section of CWA or regulations that support the objection), and

(ii) The actions that must be taken by the State Director to eliminate the objection (including the effluent limitations and conditions which the permit would include if it were issued by the Regional Administrator.)

NOTE: Paragraphs (a) and (b) of this section, in effect, modify any existing agreement between EPA and the State which provides less than 90 days for EPA to supply the specific grounds for an objection. However, when an agreement provides for an EPA review period of less than 90 days, EPA must file a general objection, in accordance with paragraph (b)(1) of this section within the time specified in the agreement. This general objection must be followed by a specific objection within the 90-day period. This modification to MOA's allows EPA to provide

detailed information concerning acceptable permit conditions, as required by section 402(d) of CWA. To avoid possible confusion, MOA's should be changed to reflect this arrangement.

(c) The Regional Administrator's objection to the issuance of a proposed permit must be based upon one or more of the following grounds:

(1) The permit fails to apply, or to ensure compliance with, any applicable requirement of this part;

NOTE: For example, the Regional Administrator may object to a permit not requiring the achievement of required effluent limitations by applicable statutory deadlines.

(2) In the case of a proposed permit for which notification to the Administrator is required under section 402(b)(5) of CWA, the written recommendations of an affected State have not been accepted by the permitting State and the Regional Administrator finds the reasons for rejecting the recommendations are inadequate;

(3) The procedures followed in connection with formulation of the proposed permit failed in a material respect to comply with procedures required by CWA or by regulations thereunder or by the Memorandum of Agreement;

(4) Any finding made by the State Director in connection with the proposed permit misinterprets CWA or any guidelines or regulations under CWA, or misapplies them to the facts;

(5) Any provisions of the proposed permit relating to the maintenance of records, reporting, monitoring, sampling,

or the provision of any other information by the permittee are inadequate, in the judgment of the Regional Administrator, to assure compliance with permit conditions, including effluent standards and limitations or standards for sewage sludge use and disposal required by CWA, by the guidelines and regulations issued under CWA, or by the proposed permit;

(6) In the case of any proposed permit with respect to which applicable effluent standards and limitations or standards for sewage sludge use and disposal under sections 301, 302, 306, 307, 318, 403, and 405 of CWA have not yet been promulgated by the Agency, the proposed permit, in the judgment of the Regional Administrator, fails to carry out the provisions of CWA or of any regulations issued under CWA; the provisions of this paragraph apply to determinations made pursuant to § 125.3(c)(2) in the absence of applicable guidelines, to best management practices under section 304(e) of CWA, which must be incorporated into permits as requirements under section 301, 306, 307, 318, 403 or 405, and to sewage sludge use and disposal requirements developed on a case-by-case basis pursuant to section 405(d) of CWA, as the case may be;

(7) Issuance of the proposed permit would in any other respect be outside the requirements of CWA, or regulations issued under CWA.

(8) The effluent limits of a permit fail to satisfy the requirements of 40 CFR 122.44(d).

(9) For a permit issued by a Great Lakes State or Tribe (as defined in 40 CFR 132.2), the permit does not satisfy the conditions promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132.

(d) Prior to notifying the State Director of an objection based upon any of the grounds set forth in paragraph (c) of this section, the Regional Administrator:

(1) Will consider all data transmitted pursuant to § 123.43 (or, in the case of a sewage sludge management program, § 501.21 of this chapter);

(2) May, if the information provided is inadequate to determine whether the proposed permit meets the guidelines and requirements of CWA, request the State Director to transmit to the Regional Administrator the complete record of the permit proceedings before the State, or any portions of the record that the Regional Administrator determines are necessary for review. If this request is made within 30 days of receipt of the State submittal under § 123.43 (or, in the case of a sewage sludge management program, § 501.21 of this chapter), it will constitute an interim objection to the issuance of the permit, and the full period of time specified in the Memorandum of Agreement for the Regional Administrator's review will recommence when the Regional Administrator has received such record or portions of the record; and

(3) May, in his or her discretion, and to the extent feasible within the period of time available under the Memorandum of Agreement, afford to interested persons an opportunity to comment on the basis for the objection;

(e) Within 90 days of receipt by the State Director of an objection by the Regional Administrator, the State or interstate agency or any interested person may request that a public hearing be held by the Regional Administrator on the objection. A public hearing in accordance with the procedures of § 124.12(c) and (d) of this chapter (or, in the case of a sewage sludge management program,

§ 501.15(d)(7) of this chapter) will be held, and public notice provided in accordance with § 124.10 of this chapter, (or, in the case of a sewage sludge management program, § 501.15(d)(5) of this chapter), whenever requested by the State or the interstate agency which proposed the permit or if warranted by significant public interest based on requests received.

(f) A public hearing held under paragraph (e) of this section shall be conducted by the Regional Administrator, and, at the Regional Administrator's discretion, with the assistance of an EPA panel designated by the Regional Administrator, in an orderly and expeditious manner.

(g) Following the public hearing, the Regional Administrator shall reaffirm the original objection, modify the terms of the objection, or withdraw the objection, and shall notify the State of this decision.

(h)(1) If no public hearing is held under paragraph (e) of this section and the State does not resubmit a permit revised to meet the Regional Administrator's objection within 90 days of receipt of the objection, the Regional Administrator may issue the permit in accordance with Parts 121, 122, and 124 of this chapter and any other guidelines and requirements of CWA.

(2) If a public hearing is held under paragraph (e) of this section, the Regional Administrator does not withdraw the objection, and the State does not resubmit a permit revised to meet the Regional Administrator's objection or modified objection within 30 days of the date of the Regional Administrator's notification under paragraph (g) of this section, the Regional Administrator may issue the permit in accordance with Parts 121, 122, and

124 of this chapter and any other guidelines and requirements of CWA.

(3) Exclusive authority to issue the permit passes to EPA when the times set out in this paragraph expire.

(i) [Reserved]

(j) The Regional Administrator may agree, in the Memorandum of Agreement under § 123.24 (or, in the case of a sewage sludge management program, § 501.14 of this chapter), to review draft permits rather than proposed permits. In such a case, a proposed permit need not be prepared by the State and transmitted to the Regional Administrator for review in accordance with this section unless the State proposes to issue a permit which differs from the draft permit reviewed by the Regional Administrator, the Regional Administrator has objected to the draft permit, or there is significant public comment.

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40 C.F.R. § 123.61 Approval process.

(a) After determining that a State program submission is complete, EPA shall publish notice of the State's application in the FEDERAL REGISTER, and in enough of the largest newspapers in the State to attract statewide attention, and shall mail notice to persons known to be interested in such matters, including all persons on appropriate State and EPA mailing lists and all permit holders and applicants within the State. The notice shall:

(1) Provide a comment period of not less than 45 days during which interested members of the public may express their views on the State program;

(2) Provide for a public hearing within the State to be held no less than 30 days after notice is published in the FEDERAL REGISTER;

(3) Indicate the cost of obtaining a copy of the State's submission;

(4) Indicate where and when the State's submission may be reviewed by the public;

(5) Indicate whom an interested member of the public should contact with any questions; and

(6) Briefly outline the fundamental aspects of the State's proposed program, and the process for EPA review and decision.

(b) Within 90 days of the receipt of a complete program submission under § 123.21 the Administrator shall approve or disapprove the program based on the requirements of this part and of CWA and taking into consideration all comments received. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and explains the Agency's response to these comments.

(c) If the Administrator approves the State's program he or she shall notify the State and publish notice in the FEDERAL REGISTER. The Regional Administrator shall suspend the issuance of permits by EPA as of the date of program approval.

(d) If the Administrator disapproves the State program he or she shall notify the State of the reasons for disapproval and of any revisions or modifications to the State program which are necessary to obtain approval.

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50 C.F.R. § 402.01 Scope.

(a) This part interprets and implements sections 7(a)-(d) [16 U.S.C. 1536(a)-(d)] of the Endangered Species Act of 1973, as amended ("Act"). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants ("listed species") and habitat of such species that has been designated as critical ("critical habitat"). Section 7(a)(1) of the Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Such affirmative conservation programs must comply with applicable permit requirements (50 CFR parts 17, 220, 222, and 227) for listed species and should be coordinated with the appropriate Secretary. Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat. Section 7(a)(3) of the Act authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine

whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat. Section 7(b) of the Act requires the Secretary, after the conclusion of early or formal consultation, to issue a written statement setting forth the Secretary's opinion detailing how the agency action affects listed species or critical habitat Biological assessments are required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity as defined in § 404.02. Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Section 7(e)-(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR part 451, and regulations governing the exemption process are found at 50 CFR parts 450, 452, and 453.

(b) The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibilities for administering the Act. The Lists of Endangered and Threatened Wildlife and Plants are found in 50 CFR 17.11 and 17.12 and the designated critical habitats

are found in 50 CFR 17.95 and 17.96 and 50 CFR part 226. Endangered or threatened species under the jurisdiction of the NMFS are located in 50 CFR 222.23(a) and 227.4. If the subject species is cited in 50 CFR 222.23(a) or 227.4, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS.

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50 C.F.R. § 402.02 Definitions.

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq*.

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Director refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for

their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11-17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Proposed critical habitat means habitat proposed in the FEDERAL REGISTER to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the FEDERAL REGISTER to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

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50 C.F.R. § 402.03 Applicability.

Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.

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50 C.F.R. § 402.12 Biological assessments.

(a) *Purpose.* A biological assessment shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary.

(b) *Preparation requirement.* (1) The procedures of this section are required for Federal actions that are "major construction activities"; provided that a contract for construction was not entered into or actual construction was not begun on or before November 10, 1978. Any person, including those who may wish to apply for an exemption from section 7(a)(2) of the Act, may prepare a biological assessment under the supervision of the Federal agency and in cooperation with the Service consistent with the procedures and requirements of this section. An exemption from the requirements of section 7(a)(2) is not permanent unless a biological assessment has been prepared.

(2) The biological assessment shall be completed before any contract for construction is entered into and before construction is begun.

(c) *Request for information.* The Federal agency or the designated non-Federal representative shall convey to the Director either (1) a written request for a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area; or (2) a written notification of the species and critical habitat that are being included in the biological assessment.

(d) *Director's response.* Within 30 days of receipt of the notification of, or the request for, a species list, the Director shall either concur with or revise the list or, in those cases where no list has been provided, advise the Federal agency or the designated non-Federal representative in writing whether, based on the best scientific and commercial data available, any listed or proposed species or designated or proposed critical habitat may be present in the action area. In addition to listed and proposed species, the Director will provide a list of candidate species that may be present in the action area. Candidate species refers to any species being considered by the Service for listing as endangered or threatened species but not yet the subject of a proposed rule. Although candidate species have no legal status and are accorded no protection under the Act, their inclusion will alert the Federal agency of potential proposals or listings.

(1) If the Director advises that no listed species or critical habitat may be present, the Federal agency need not prepare a biological assessment and further consultation is not required. If only proposed species or proposed critical habitat may be present in the action area, then the Federal agency must confer with the Service if required under § 402.10, but preparation of a biological assessment is not required unless the proposed listing and/or designation becomes final.

(2) If a listed species or critical habitat may be present in the action area, the Director will provide a species list or concur with the species list provided. The Director also will provide available information (or references thereto) regarding these species and critical habitat, and may recommend discretionary studies or surveys that may provide a better information base for the preparation of an assessment. Any recommendation for studies or surveys is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act.

(e) *Verification of current accuracy of species list.* If the Federal agency or the designated non-Federal representative does not begin preparation of the biological assessment within 90 days of receipt of (or concurrence with) the species list, the Federal agency or the designated non-Federal representative must verify (formally or informally) with the Service the current accuracy of the species list at the time the preparation of the assessment is begun.

(f) *Contents.* The contents of a biological assessment are at the discretion of the Federal agency and will depend on the nature of the Federal action. The following may be considered for inclusion:

(1) The results of an on-site inspection of the area affected by the action to determine if listed or proposed species are present or occur seasonally.

(2) The views of recognized experts on the species at issue.

(3) A review of the literature and other information.

(4) An analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.

(5) An analysis of alternate actions considered by the Federal agency for the proposed action.

(g) *Incorporation by reference.* If a proposed action requiring the preparation of a biological assessment is identical, or very similar, to a previous action for which a biological assessment was prepared, the Federal agency may fulfill the biological assessment requirement for the proposed action by incorporating by reference the earlier biological assessment, plus any supporting data from other documents that are pertinent to the consultation, into a written certification that:

(1) The proposed action involves similar impacts to the same species in the same geographic area;

(2) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and

(3) The biological assessment has been supplemented with any relevant changes in information.

(h) *Permit requirements.* If conducting a biological assessment will involve the taking of a listed species, a permit under section 10 of the Act (16 U.S.C. 1539) and part 17 of this title (with respect to species under the jurisdiction of the FWS) or parts 220, 222, and 227 of this title (with respect to species under the jurisdiction of the NMFS) is required.

(i) *Completion time.* The Federal agency or the designated non-Federal representative shall complete the

biological assessment within 180 days after its initiation (receipt of or concurrence with the species list) unless a different period of time is agreed to by the Director and the Federal agency. If a permit or license applicant is involved, the 180-day period may not be extended unless the agency provides the applicant, before the close of the 180-day period, with a written statement setting forth the estimated length of the proposed extension and the reasons why such an extension is necessary.

(j) *Submission of biological assessment.* The Federal agency shall submit the completed biological assessment to the Director for review. The Director will respond in writing within 30 days as to whether or not he concurs with the findings of the biological assessment. At the option of the Federal agency, formal consultation may be initiated under § 402.14(c) concurrently with the submission of the assessment.

(k) *Use of the biological assessment.* (1) The Federal agency shall use the biological assessment in determining whether formal consultation or a conference is required under § 402.14 or § 402.10, respectively. If the biological assessment indicates that there are no listed species or critical habitat present that are likely to be adversely affected by the action and the Director concurs as specified in paragraph (j) of this section, then formal consultation is not required. If the biological assessment indicates that the action is not likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, and the Director concurs, then a conference is not required.

(2) The Director may use the results of the biological assessment in (i) determining whether to request the

Federal agency to initiate formal consultation or a conference, (ii) formulating a biological opinion, or (iii) formulating a preliminary biological opinion.

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50 C.F.R. § 402.14 Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or

the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to

§ 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy

opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate

consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions.* The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraph (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph

(i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

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50 C.F.R. § 402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

FEDERAL REGISTER

66 Fed. Reg. 11202 (Feb. 22, 2001)

ENVIRONMENTAL PROTECTION AGENCY

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[FRL-6937-6]

Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act

AGENCIES: Environmental Protection Agency, Fish and Wildlife Service, Department of Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration.

ACTION: Notice.

SUMMARY: The Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service have signed a Memorandum of Agreement (MOA) addressing interagency coordination under the Clean Water Act and Endangered Species Act. This notice discusses comments received on a draft of the MOA published by the Agencies on January 15, 1999, describes the changes we have made to the draft, and publishes the final MOA.

FOR FURTHER INFORMATION CONTACT: Brian Thompson, Standards and Health Protection Division (4305), U.S. EPA, Office of Science and Technology, 1200

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SUPPLEMENTARY INFORMATION: On January 15, 1999, the Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) published for public comment a draft Memorandum of Agreement (MOA) addressing coordination under the Clean Water Act (CWA) and Endangered Species Act (ESA). 64 Fed. Reg. 2742. We have considered all the public comments submitted on the draft MOA, made revisions, and signed a final version of the document. Today's notice discusses comments we received on the draft MOA, summarizes the changes we have made, and publishes the final MOA.

The MOA is designed to enhance coordination between our agencies so that we can best carry out our responsibilities under the CWA and ESA. In recent years, we have increasingly sought to integrate our programs. For example, EPA now consults with the Services under section 7 of the ESA on EPA's promulgation and approval of water quality standards under section 303(c) of the CWA and approval of State National Pollutant Discharge Elimination System (NPDES) permitting programs under section 402(b). The MOA seeks to enhance the efficiency and effectiveness of consultations on these actions in the future by providing guidance to our regional and field offices and establishing an elevation process to resolve

quickly issues that may arise. The MOA also seeks to enhance coordination at the national level by, among other things, establishing a joint national research plan that will prioritize research on the effects of water pollution on endangered and threatened species. We believe that the MOA will help make our work together more productive and timely, to the benefit of endangered and threatened species and the aquatic environment generally, as well as the regulated community and State and Tribal coregulators.

The provisions of the ESA, CWA and our regulations described in the MOA contain legally binding requirements. The MOA itself does not alter, expand, or substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally-binding requirements on EPA, States,[1] Tribes,[2] or the regulated community. Rather, the MOA contains internal procedural guidance to our staff to assist us in carrying out existing legal requirements. Based on experience in implementing the MOA, we may change the MOA in the future.

I. Statutory Background

Section 7 of the ESA imposes substantive and procedural obligations on Federal agencies. Section 7(a)(1) of the ESA requires Federal agencies, in consultation with and with the assistance of the Services, to utilize their

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[1] For purposes of the MOA, "States" mean States, Territories and Commonwealths that qualify as States for the programs covered by the Agreement.

[2] For purposes of the MOA, "Tribes" mean those Tribes that are authorized for treatment as States for the programs covered by the Agreement. See CWA 518(e).

authorities to further the purposes of the ESA by carrying out programs for the conservation of listed threatened and endangered species. Section 7(a)(2) of the ESA states that Federal agencies shall, in consultation with, and with the assistance of the Services, ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat that has been designated as critical for the species. Section 7(a)(4) of the ESA also requires that Federal agencies confer with the Services on any agency action that is likely to jeopardize the continued existence of any species proposed for listing, or result in the destruction or adverse modification of proposed critical habitat. Regulations outlining the process for section 7 consultation and conferencing are codified at 50 CFR part 402. The ESA also makes it unlawful for any person to "take" any fish or wildlife species that is listed under the Act. ESA 9(a)(1)(B). "Take" is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in such conduct." 16 U.S.C. 1532(19). However, the Services may provide an exemption to the prohibition on take that is incidental to otherwise legal activity through a statement that is attached to a biological opinion. The incidental take statement specifies the terms and conditions necessary to carry out reasonable and prudent measures that will minimize the incidental take.

EPA's authorities under the water quality standards and NPDES permitting programs are contained in sections 303(c), 304(a) and 402 of the CWA. Under section 303(c), the development of water quality standards is primarily the responsibility of States and Tribes qualified for treatment in the same manner as States, with EPA

exercising an oversight role. Water quality standards consist of three components: (1) The designated uses of waters, which can include use for public water supplies, propagation of fish and wildlife, recreational, agricultural, industrial and other uses; (2) water quality criteria, expressed in numeric or narrative form, reflecting the condition of the water body that is necessary to protect its designated use, and (3) an antidegradation policy that protects existing uses and provides a mechanism for maintaining high water quality. States and Tribes are required to review their standards every three years and any revisions or new standards must be submitted to EPA for approval. Section 303(c) contains time frames for EPA to review and either approve or disapprove standards submitted by a State or Tribe, and requires EPA to promulgate Federal standards to supersede disapproved State or Tribal standards. In addition, section 303(c) authorizes EPA to promulgate Federal standards whenever the Administrator determines that such standards are necessary to meet the requirements of the CWA. Regulations implementing section 303(c) are codified at 40 CFR part 131.

Under section 304(a) of the CWA, EPA from time to time publishes recommended water quality criteria that serve as scientific guidance for use by States or Tribes in establishing and revising water quality standards. These criteria are not enforceable requirements, but are recommended criteria levels that States or Tribes may adopt as part of their legally enforceable water quality standards. States or Tribes may adopt other scientifically defensible criteria instead of EPA's recommended criteria (see 40 CFR 131.11(b)).

The NPDES permitting program is established by section 402 of the CWA. Any person that discharges a

pollutant (other than dredged or fill material) into waters of the United States from a point source must obtain an NPDES permit. See CWA section 301(a). (Dischargers of dredged or fill material must obtain a permit under section 404 of the CWA from the Army Corps of Engineers or an authorized State.) EPA issues permits under section 402 unless a State or Tribe has been approved by EPA to administer the permitting program. Any NPDES permit must contain limitations to reflect the application of available treatment technologies, as well as any more stringent limitations needed to ensure compliance with water quality standards. CWA 301(b). EPA has promulgated regulations governing the administration of the NPDES program. See 40 CFR parts 122, 124-125.

The CWA authorizes States or Tribes to administer the NPDES program provided the program meets the conditions specified in section 402(b) of the Act and EPA regulations. See 40 CFR part 123. Currently, 43 States and the U.S. Virgin Islands have received approval from EPA to operate the NPDES program. Authorized States and Tribes are required to maintain their programs consistent with minimum statutory and regulatory requirements. When EPA approves State or Tribal authority to administer an NPDES program, EPA maintains oversight responsibility, including the authority to review, comment on and, where a permit is "outside the guidelines and requirements" of the CWA, object to State or Tribal draft permits. CWA section 402(d)(2). If EPA objects to a State or Tribal permit and the State or Tribe fails to revise the permit to satisfy EPA's objection, the authority to issue the permit is transferred to EPA. Section 402(c) of the CWA authorizes EPA to withdraw the State's or Tribe's

permitting authority if EPA determines the program is not being administered in accordance with the Act.

II. Overview of Public Comments

EPA and the Services received comments from individuals, private industry, environmental organizations and other governmental agencies on the draft MOA. We have not attempted below to summarize or address the detailed contents of each of the public comments. We have, however, considered each of the comments in developing the final MOA. We address in this notice the major themes and concerns raised by the public comments.

Many commenters supported the MOA's goal of fostering early input by the Services into decision-making under the CWA standards and permitting programs. These commenters believed integrating the Services early into existing regulatory processes would help ensure species protection issues are addressed effectively and in a timely manner. Many commenters expressed concern, however, that the MOA would increase burdens on States and viewed the MOA as seeking to shift EPA's section 7 consultation responsibilities to States. Some commenters supported our proposed plan to conduct national programmatic consultations on water quality criteria and permit oversight procedures as likely to reduce the redundancy of State-by-State consultation. Others [sic] commenters believed that these programmatic consultations would be inappropriate and inconsistent with the requirements of the ESA. Finally, some commenters believed that the MOA failed to focus adequately on EPA's responsibility under section 7(a)(1) of the ESA to utilize its authorities to carry out programs for the conservation of listed species.

We continue to believe that early involvement of the Services in CWA activities is important to ensuring that species protection concerns are addressed effectively in the water quality standards and permitting programs. The Services have substantial expertise that can help improve decision-making by EPA, States and Tribes. Obtaining their expertise early in the regulatory process helps ensure that their views are meaningfully considered, and that the broadest range of management options are available to ensure the protection of species.

This does not mean, however, that the MOA calls for States and Tribes to "consult" with the Services under section 7 of the ESA, or that burdens in administering their programs will be increased. The MOA cannot, and does not, impose any requirements of section 7 on States and Tribes. Those requirements apply solely to Federal agencies, and EPA continues to be responsible for fulfilling any applicable requirements of section 7 in its administration of the CWA. (While States and Tribes may choose to function as "non-federal representatives" for purposes of informal consultation pursuant to 50 CFR 402.18, the responsibility for compliance with section 7 remains with EPA.)

Moreover, the MOA does not address in any way the obligations of States and Tribes under the CWA or the ESA, other than to note in a few instances requirements of existing laws and regulations. See, e.g., section IX.A. paragraph 2 (noting State/Tribal obligation under EPA CWA regulations to provide copies of draft NPDES permits to the Services). Thus, while the MOA should facilitate greater interaction between the Services and States/Tribes, it does not change the legal requirements that States or Tribes must meet in adopting water quality

standards or in issuing NPDES permits, and does not require States or Tribes to perform any information-gathering or other analyses that would not be required under existing legal requirements. Rather, the MOA is intended to enhance communication between the Services, EPA and States/Tribes about how to ensure that water quality standards and NPDES permits will protect endangered and threatened species. In response to comments that the national consultations are inappropriate or inconsistent with the ESA, we will conduct the consultations in accordance with all applicable requirements of the ESA and 50 CFR part 402.

Finally, we agree with the comment that the MOA should put greater emphasis on the development of programs by EPA, in consultation with the Services, for the conservation of listed species under section 7(a)(1) of the ESA. The CWA is a powerful vehicle for improving the quality of the aquatic environment on which many endangered and threatened species depend. EPA's mission under the CWA includes reducing the risks to aquatic life and wildlife due to water quality degradation. Reducing those risks can also help facilitate the recovery of listed species. While the MOA will help ensure that EPA actions meet the substantive requirements of section 7(a)(2) of the ESA, we believe the MOA should also help identify affirmative steps under section 7(a)(1) of the ESA that EPA can take pursuant to its CWA authorities to facilitate the recovery of listed species. We have made appropriate additions to the MOA in this respect, which are noted in the discussion below.

III. Summary of the Final MOA

We have retained in the final MOA the following basic components of the January 1999 draft MOA: (1) Interagency coordination and elevation; (2) national level activities; (3) oversight of State and Tribal water quality standards; (4) State and Tribal NPDES permitting programs. Each of these is addressed below.

A. Interagency Coordination and Elevation

One of the most important objectives of the MOA is to institutionalize strong working relationships among our regional and field offices who have day-to-day responsibility for administering our programs. Ongoing planning and collaboration at the regional/field level are essential to carrying out our programs effectively. Therefore, the MOA directs our staff to establish local/regional review teams that will meet periodically to identify upcoming priorities and workload requirements and generally ensure close coordination on the full range of activities involving water quality and endangered/threatened species protection. These teams will also develop procedures for working with States and Tribes on these matters. We have added language to the MOA stating that the regional review teams should also provide assistance to the interagency oversight panel in conducting a proactive conservation review that will identify ways in which EPA can more fully utilize its authorities for the conservation of listed species.

We also believe that effective coordination among senior managers at the regional level is vital to maintaining effective working relationships. Therefore, in addition to directing regional staff and day-to-day managers to meet on a regular basis through the regional review

teams, we have added to the MOA a directive that EPA and Service regional senior managers (e.g., Regional Administrator or Division Director from EPA, Regional Director or Assistant Regional Director from the FWS, Assistant Regional Administrator for NMFS) meet at least annually to review on a programmatic basis ongoing work between our agencies. These meetings will focus on establishing overall priorities, assessing resource needs and providing direction to mid-level managers and staff.

The draft MOA also included a procedure for elevating issues that may arise among our regional and field offices. We have included the elevation procedure in the final MOA with certain revisions. First, one commenter believed that the proposed elevation process applied only to disagreements that may arise in formal section 7 consultations, and requested clarification of the scope of issues addressed by the elevation procedure. We did not intend to use the elevation process solely for issues arising in formal section 7 consultations. It is available to resolve disagreements arising in formal or informal consultations, or other areas of cooperation, such as EPA oversight of State/Tribal NPDES permits. Moreover, because the elevation procedure is generic, we intend to make it available for any issues arising with regard to section 7 consultations on EPA actions under the CWA in areas not specifically addressed by the MOA. The purpose of the elevation procedure is to help us reach informed and timely decisions, and making this procedure available whenever we are engaged in the section 7 process with regard to EPA actions under the CWA will help achieve this objective. The procedures may be used to review matters such as the content or supporting analyses of biological evaluations prepared by EPA or biological opinions prepared by the

Services. However, the elevation process does not impair in any way the ultimate authority of EPA or the Services to issue decisions or render determinations that are within each agency's authority under the CWA and the ESA.

Also, to make the elevation process more workable, we have reduced the number of steps involved in the elevation at the regional level. In the final MOA, the first step in any elevation will be to raise an issue to our regional directors/administrators, rather than requiring an intermediate step of elevating the issue to mid-level managers. This revision recognizes that mid-level managers are typically involved in issues on an ongoing basis, and that these managers should seek to resolve issues informally if possible. By eliminating a step in the elevation process, the final MOA will also help speed resolution of issues should elevation be necessary. Much of the MOA is designed, however, to enhance early and ongoing collaboration among our agencies. We continue to believe that issues should be resolved at the lowest levels possible, and enhanced coordination should reduce the likelihood that elevation will be needed.

Some commenters suggested that the results of decisions in an elevation be documented so that they could serve as guidance in other similar circumstances. The agencies will memorialize the results of the elevation in writing where determined to be appropriate (e.g., where the results of the elevation would provide useful guidance to agency staff).

We have also retained in the final MOA an oversight panel that will consist of regional and headquarters personnel to provide oversight and coordination on all aspects of the agreement. In addition, we have amended the draft MOA to specify that the oversight panel, with

input from the regional review teams will conduct a "proactive conservation review" (see section V(A)(3)(7)) under section 7(a)(1) of the ESA regarding EPA's authorities and identify ways that EPA can more fully utilize those authorities to carry out programs for the conservation of listed species.

B. National Level Activities

The draft MOA included four national level activities to help better integrate our programs: (1) A water quality standards rulemaking; (2) development of new water quality criteria methodological guidelines; (3) national consultations on EPA's section 304(a) aquatic life water quality criteria recommendations and on procedures to ensure State/Tribal NPDES permits protect listed species, and (4) a joint national research and data gathering plan. The final MOA retains these components basically as contained in the draft MOA, with some changes, in particular with regard to the national consultations, and those changes, as well as relevant public comments, are discussed below.

1. Water Quality Standards Rulemaking

The draft MOA indicated that EPA would propose to amend EPA's water quality standards regulations to provide that water quality shall be not likely to jeopardize the continued existence of a listed species. We stated that such a rule would essentially codify existing protection for endangered and threatened species under the CWA since water quality that is so poor it would likely jeopardize a listed species or destroy or adversely modify critical

habitat fails to meet the fundamental requirements of the CWA.

Several commenters believed that this rule would be inconsistent with the CWA because it would remove the flexibility of States and Tribes under section 303(c)(2)(A) to establish use designations based on the uses that are attainable in the waterbody. EPA and the Services do not believe that flexibility will be removed from the States and Tribes to change use designations with use attainability analyses. Any changes in use designations must comply with the long-standing requirements in 40 CFR part 131. Further, any changes in use designations must be approved by EPA under section 303(c) of the CWA. These approvals are subject to the requirements of section 7 of the ESA. With the early coordination envisioned by the Services and EPA to address listed species needs during triennial reviews, more species-specific and site specific information and expertise will complement defensible use attainability analyses performed by the States and Tribes. Justifiable changes can be still made after taking into account the needs of listed species.

2. Development of New Water Quality Criteria Methodological Guidelines

The final MOA provides that the Services will participate in EPA's development of new methodological guidelines for the development of aquatic life criteria under section 304(a) of the CWA. We received no significant comments on this provision, which is unchanged from the January 1999 draft MOA.

3. National Consultations

The draft MOA described national consultations that EPA and the Services intended to undertake regarding EPA's water quality criteria for the protection of aquatic life that EPA has published under section 304(a) of the CWA, and on procedures in the MOA to ensure that State/Tribal NPDES permits will protect listed species. As discussed further below, we have decided to delete the provision for a national permits consultation from the MOA, and have modified in certain respects the discussion of the national criteria consultation.

With regard to the national permits consultation some commenters questioned whether the granting of an exemption from incidental take prohibitions would be appropriate through an incidental take statement issued at the national level without consideration of site-specific circumstances. Other commenters were unclear as to the effect that such a consultation would have on existing state NPDES programs, and were concerned that the agencies not "reopen" those programs through the national consultation.

We have considered these comments and have had further interagency discussions of the merits of this programmatic consultation on the permitting procedures. We have decided to delete the discussion of that consultation from the final MOA and, at this time, do not intend to undertake such a consultation on permitting procedures. Our decision not to conduct a national programmatic consultation does not affect our commitment to follow the procedures in section IX of the MOA for coordination with regard to oversight of State/Tribal NPDES permits. Those procedures are designed to share information that will

assist permitting authorities in meeting CWA requirements, including the protection of listed species. They describe those circumstances where EPA would use its oversight authorities to ensure these requirements and objectives are met.

EPA's current practice is to consult with the Services where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federally listed species. We will continue to conduct such consultations on a case-by-case basis. Where formal consultation is undertaken, a biological opinion issued by the Service(s) would include an incidental take statement in accordance with section 7 of the ESA and 50 CFR Part 402. In addition, as discussed elsewhere in today's notice and in the final MOA, EPA consults with the Services regarding its approval of new and revised water quality standards that may affect listed species, and any biological opinion issued as a result of such a consultation would include an incidental take statement in accordance with section 7 of the ESA and 50 CFR Part 402.

With regard to the national criteria consultations, States generally supported our undertaking such consultations as it would streamline the water quality standards adoption and approval process at the State level, and avoid duplication of effort involved in consulting on a State-by-State basis. Other commenters stated that EPA should not consult on the section 304(a) criteria because they are not an agency "action" under section 7. Still others believed that national consultations on aquatic life criteria would not be based on the "best available information" as required by section 7 of the ESA. EPA and the Services have agreed, however, that it is appropriate to conduct these consultations pursuant to section 7(a)(2) for

304(a) aquatic life criteria to ensure the protection of listed species. Moreover, we fully intend to base consultations on the "best available information," as required by section 7, and do not believe that this requirement precludes us from conducting the consultations on a national basis.

Some commenters contended that we should not consult on existing aquatic life criteria, since they are based on old methodologies and that EPA should consult instead only on new criteria. We believe that consulting on EPA's existing section 304(a) aquatic life criteria is warranted because these criteria have been adopted by many States in their water quality standards, and this consultation will assist us in determining whether these criteria are protective of endangered and threatened species. EPA will consider the results of the consultation in deciding whether more stringent criteria would be warranted to protect certain endangered or threatened species. EPA also intends to integrate the national consultation process with ongoing revisions to existing criteria that are underway, as well the development of new criteria.

Commenters raised the additional concern that a national consultation was likely to lead to the development of overly stringent water quality criteria and that consultations should, therefore, continue to take place on a State level. We disagree, since EPA would revise the criteria if it determines that more stringent criteria were in fact needed to protect endangered and threatened species, regardless of whether the consultation occurred on a national or State/Tribal level. Moreover, revisions to the criteria guidance could be targeted to the waters within the geographic range of species of concern (e.g., through recommendations to adopt site-specific criteria). In this

way, other waters not needing the additional level of protection would not be affected by the revisions.

Other commenters raised the question whether, under section 7(d) of the ESA, EPA and States could continue to implement existing CWA requirements while the national consultations are ongoing. Section 7(d) prohibits federal agencies and a permit or license applicant, after initiation of consultation, from making an irretrievable or irrevocable commitment of resources that would preclude the formulation or implementation of alternatives identified in the consultation required to meet the requirements of section 7(a)(2) of the ESA. We disagree that the initiation of the national consultations on criteria would limit the ability of EPA, States or Tribes to continue implementing existing requirements under the CWA. The water quality criteria guidance does not involve any irretrievable or irrevocable commitment of resources. The criteria guidance can, and will, be revised if as a result of the consultations a determination is made that revisions are necessary to comply with section 7(a)(2) of the ESA. Moreover, if in the future EPA proposes to undertake an action that is covered by the national consultations prior to the conclusion of these consultations (e.g., approval or promulgation of an aquatic life criteria identical to or more stringent than EPA's guidance value), EPA will make a determination of compliance with section 7(d) at that time based on the particular facts, recognizing that EPA retains the authority to require revisions to water quality and standards, and promulgate them if necessary. Finally, the aquatic life criteria guidance is fundamentally designed to ensure protection of the aquatic environment and we do not believe that section 7(d) of the ESA would impede their implementation pending completion of consultation.

Since the draft of the MOA was published in January 1999, EPA and the Services have undertaken a series of meetings that have resulted in a broad agreement on the scientific and technical procedures for conducting the consultations. These meetings have led to a realistic assessment of the resources and time necessary to conduct the consultation, and to an understanding that the consultation should be phased and that priorities should be set to deal with the most important pollutants and issues first. As a result, the final MOA states that the consultation will be completed in an expedited manner, rather than the less flexible strict timetable of eighteen months contained in the draft MOA.

4. Joint National Research Plan

The final MOA retains the draft MOA's provisions for the Agencies to establish a joint national research and data gathering plan for prioritizing and funding research on the effect of water pollution on listed species. We received no significant comments on this portion of the MOA, which is unchanged from the 1999 draft.

C. Oversight of State and Tribal Water Quality Standards

We did not receive extensive comments on the provisions in the MOA related to oversight of State/Tribal water quality standards. Some commenters contended that EPA approval of water quality standards is not subject to section 7 of the ESA because EPA approval is non-discretionary. EPA disagrees, since our decision as to whether a particular standard meets the requirements of the CWA involves the exercise of considerable judgment.

We believe that where approval of new or revised standards may have an effect on a listed species or designated critical habitat, consultation under section 7(a)(2) is required. Other commenters argued that EPA should consult not only on new and revised standards, but also on existing water quality standards. EPA and the Services have agreed that where information indicates an existing standard is not adequate to avoid jeopardizing listed species, or destroying or adversely modifying designated critical habitat, EPA will work with the State/Tribe to obtain revisions in the standard or, if necessary, revise the standards through the promulgation of federal water quality standards under section 303(c)(4)(B) of the CWA. Some commenters said that it is not appropriate for EPA to compel a State to reopen an existing water quality standard to avoid "jeopardy" because that threshold is not contained in the CWA, and nothing in the CWA requires that water quality be improved whenever doing so would benefit listed species. Again, water-dependent endangered and threatened species are an important component of the aquatic environment that the CWA is designed to protect, and steps to ensure the protection of those species are well within the scope of the CWA.

After consideration of public comments on this aspect of the MOA, we have decided to retain the language of the 1999 draft MOA with no major substantive changes.

D. State/Tribal Permitting Programs

The final MOA addresses the procedures that we will follow in overseeing the operation of State/Tribal NPDES permits to ensure that listed species and critical habitats are protected. Several commenters raised concerns that

the coordination process described in the MOA was equivalent to the section 7 consultation process. This is incorrect. Section 7 consultations are governed by the specific procedures contained in 50 CFR part 402. The coordination procedures in the MOA do not track the consultation process. Rather, the coordination procedures simply outline the interaction that we envision between EPA, the Services and the State/Tribe should a particular permit raise issues of concern for listed species. The MOA also makes clear that EPA's oversight of State/Tribal permits will continue to be governed by EPA's CWA authorities. For example, EPA may only object to a permit that is "outside the guidelines and requirements" of the CWA as provided in section 402(d) of the CWA. We are confident that EPA's CWA authorities are sufficiently broad and the MOA sufficiently flexible to address the broad range of situations that arise in the NPDES program.

Some commenters expressed concerns that the permit coordination procedures not be used to "force" States and Tribes to undertake activities not otherwise required by the CWA. As stated previously, the MOA only provides internal procedural guidance for EPA and the Services and does not impose any requirements on States and Tribes. States and Tribes are specifically directed by current EPA regulations under the CWA to provide the Services with copies of draft NPDES permits, and they must consider and respond to any significant comments by any party, including comments provided by the Services. See 40 CFR §§ 124.10(c)(iv) and (e); 124.11; 124.17. See also 40 CFR § 124.59(b) and (c) (addressing consideration of Service comments and coordination between the permitting authority and the Services). The MOA does not augment these existing obligations, but is intended to facilitate the

delivery of comments by the Services and EPA to States and Tribes, and the consideration of those comments in the permitting process.

One commenter argued that the MOA was inconsistent with the decision in *AFPA v. EPA* 137 F.3d 291 (5th Cir. 1998) because, while it does not place conditions on approval of State NPDES programs, it nonetheless places conditions on "approval" of State permits. This contention is incorrect. First, EPA does not "approve" State/Tribal permits, but rather retains discretionary authority to comment upon and object to permits on a case-by-case basis. The MOA does not change the criteria under which EPA currently exercises that authority – i.e., whether a permit meets applicable CWA requirements – but simply ensures that EPA has the full benefit of the Services' views on potential impacts to Federally listed species and designated critical habitats in determining whether CWA requirements are met.

Several commenters expressed concern that the permit coordination procedures did not recognize the importance of keeping permittees involved in the decision-making process. We believe that the permitting authority should always maintain open communication with permittees to ensure that they are apprised of, and can provide input on, decisions that affect them. We have, therefore, added a clause in the permit coordination procedures stating that EPA will encourage the permitting authority to facilitate the involvement of permittees and permit applicants in this process.

In addition, the draft MOA referred to potential "adverse effects" to listed species in the permit coordination procedures. We were concerned that the use of this

wording, which is an ESA term under section 7, could have been read as suggesting that the section 7 process was being followed with regard to State/Tribal permits, where in fact the MOA establishes a coordination procedure to ensure protection of listed species. To avoid any confusion, we have used the words "more than minor detrimental effects" in place of "adverse effects." Our intent remains to work together and with State/Tribal permitting authorities to ensure that concerns about the impacts of State/Tribal permits on listed species are addressed in the permitting process. As discussed elsewhere, the MOA also helps ensure in a variety of ways that water quality standards adopted by States and Tribes are protective of listed species, and implementation of such standards (i.e., standards that have undergone Section 7 consultation) through NPDES permits will help reduce any negative effects of discharges on listed species.

IV. Conclusion

We are confident that implementation of the final MOA will improve the effectiveness of our efforts to protect water quality and conserve endangered and threatened species. The ESA and the CWA contain powerful tools that, when integrated effectively, will advance the objectives of both Acts, and the MOA will help us achieve those goals.

Dated: January 10, 2001.

J. Charles Fox,

Assistant Administrator for Water, U.S. Environmental Protection Agency.

Dated: January 17, 2001.

Jamie Rappaport Clark,

Director, U.S. Fish and Wildlife Service.

Dated: January 18, 2001.

Penelope D. Dalton,

Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

The text of the final Memorandum of Agreement follows.

Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and the Endangered Species Act

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XIV. Nature of Agreement

XV. Effective Date; Termination

XVI. Signatories

I. Purpose

This Agreement is designed (1) to improve coordination of the agencies' compliance with the Endangered Species Act (ESA) for actions authorized, funded, or

carried out by EPA under sections 303(c) and 402 of the Clean Water Act (CWA), and (2) to provide clear and efficient mechanisms for improved interagency cooperation, thereby enhancing protection and promoting the recovery of threatened and endangered species and their supporting ecosystems, and reducing the need for future listing actions under the ESA. Throughout this Agreement, "Service" or "Services" shall refer to the Fish and Wildlife Service (FWS) and/or National Marine Fisheries Service (NMFS), as appropriate. In this Agreement "States" refers to States, Territories and Commonwealths that qualify as States for the programs covered by this Agreement, and "Tribes" refers to Tribes that qualify for treatment in the same manner as States under section 518 of the CWA.

II. Goals and Objectives

This Agreement is intended to accomplish the following:

- Use a team approach at the national, regional, and field office levels to restore and protect watersheds and ecosystems to achieve the goals of the ESA and CWA;
- Improve the framework for meeting responsibilities under section 7 of the ESA;
- Enhance the existing process in place to protect and recover Federally-listed and proposed species and the ecosystems on which they depend;
- Improve methods for coordinating compliance with sections 303(c) and 402 of the CWA and section 7 of the ESA;

- Streamline the Federal agency coordination process to minimize the regulatory burden, workload, and paperwork for all involved parties;
- Ensure a nationally consistent coordination process that allows flexibility to deal with site-specific issues;
- Develop mechanisms for EPA participation in the development and implementation of recovery plans for Federally-listed species threatened by physical, chemical or biological impairment of waters of the United States;
- Provide mechanisms for the Services' participation in development of water quality criteria and standards recognizing any unique requirements for listed and proposed species and designated and proposed critical habitat;
- Identify a collaborative mechanism for planning and prioritizing future CWA/ESA actions and resolving any potential conflicts or disagreements through a structured time-sensitive process at the lowest possible level within the agencies.

III. Guiding Principles

The ESA sets forth the goal of protecting and recovering threatened and endangered species and the ecosystems upon which they depend. It places responsibility on all Federal agencies, including EPA and the Services, to meet that goal. The Clean Water Act (CWA) sets forth a goal of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. Sections 303(c) and 402 of the CWA (as well as other provisions) are directed toward achieving this goal.

EPA and the Services find the goals of the CWA and ESA compatible and complementary, and are entering into this Agreement to affirm a partnership to enhance the realization of the goals of both Acts. This partnership will also seek to efficiently and effectively fulfill the requirements of section 7 of the ESA.

The primary principle underlying this Agreement is cooperative partnership. The ESA requires the involvement of all Federal agencies in the protection and recovery of our Nation's unique biological resources. As a result of this Agreement, the signatory agencies will better coordinate their efforts and will make it easier for the regulated community and other partners to work with them in achieving the purposes of the CWA and ESA.

While States and Tribes play a critical role in the administration and implementation of sections 303(c) and 402 of the CWA, they are not signatories to this agreement, which only addresses EPA's and the Services' responsibilities under section 7 of the ESA. The Services and EPA remain committed to working with the States and Tribes collaboratively at all levels to ensure that both the CWA and ESA are implemented in a manner that fulfills the goals of both statutes in a timely and efficient manner.

IV. Authorities

A. *Fish and Wildlife Service and National Marine Fisheries Service Authorities*

This Agreement relates to the following authorities of the Services: Section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544).

B. Environmental Protection Agency Authorities

This Agreement relates to the following authorities of EPA: Sections 303(c), 304(a) and 402 of the Clean Water Act, as amended, 33 U.S.C. 1251-1387.

C. Reservation of Authorities

This Agreement does not modify existing Agency authorities by reducing, expanding, or transferring any of the statutory or regulatory authorities and responsibilities of any of the signatory agencies.

V. Provisions and Understandings

A. Procedures to Facilitate Interagency Cooperation

EPA and the Services intend to work cooperatively to achieve their mutually shared objectives of protecting the quality of waters of the United States and species that depend on those waters. To facilitate collaboration among agency field and regional staff for planning and prioritizing future CWA/ESA actions and resolving any potential conflicts or disagreements through a structured, time-sensitive process at the lowest possible level, the agencies will follow the coordination and elevation procedures described below.

1. Local/Regional Coordinating Teams

The regional offices of EPA and the Services will establish coordinating teams, including representation from field offices, to foster early and recurring collaboration on various activities related to the CWA and the ESA. These teams will, as appropriate:

a. Meet at least twice annually;

b. Identify upcoming workload requirements. This dialogue will allow signatory agencies to become aware of and provide input on upcoming activities such as annual work plans, triennial water quality standards reviews, recovery plan preparation, proposed State or Tribal program assumptions, proposed listings, or proposed habitat conservation planning efforts;

c. Identify high priority areas of concern and opportunities for cooperation;

d. Assist one another in determining which categories of NPDES permits should be identified for review by EPA and the Services for endangered species concerns, including waters of high concern in each State that should be priorities for EPA oversight; and how to identify, in cooperation with States and Tribes, the available information for evaluating effects of permitted discharges on species;

e. Identify current and future research needs and determine which of these research needs are appropriate to convey to the research coordinating committee and which are appropriate for local or regional accomplishment;

f. Identify training needs;

g. Identify ways to reduce the impacts of proposed agency actions on endangered and threatened species; and

h. Assist the oversight panel in conducting a programmatic review of EPA's authorities and identifying ways that EPA can more fully utilize those authorities to carry out programs for the conservation of listed species.

Each of these local/regional coordinating teams will develop mechanisms to facilitate streamlining of various work activities as appropriate to the local circumstances. Such streamlining should facilitate early exchange of information, early prioritization of workload, and early identification of potential problems. Each local group should develop mechanisms to work with States and Tribes, as appropriate, concerning such things as candidate conservation agreements, recovery planning, triennial reviews, and annual CWA priorities. Local/regional coordinating teams may develop mechanisms to involve other Federal agencies such as the U.S. Army Corps of Engineers, the Forest Service, the Federal Energy Regulatory Commission, and non-Federal stakeholders whose actions and interests may impact the CWA/ESA issues.

2. Interagency Elevation Process

The following procedures shall be utilized to elevate any conflict or disagreement between the agencies arising with regard to the activities addressed by this agreement, including formal or informal section 7 consultations, as well as disagreements arising in section 7 consultations on EPA actions under the CWA that are not specifically addressed by this agreement. The procedures may be used to review matters such as the content of biological evaluations or supporting analyses prepared by EPA or biological opinions prepared by the Services. However, the elevation process does not impair in any way the ultimate authority of EPA or the Services to issue decisions or render determinations that are within each agency's authority under the CWA and the ESA. While decisions by all levels, including decisions to elevate, will be made by consensus to the greatest extent practicable, any one agency can

initiate the elevation process. Elevation should be initiated so that all applicable deadlines may be met, taking into account subsequent levels of review. In any elevation, the agencies will jointly prepare an elevation document that will contain a joint statement of facts and succinctly state each agency's position and recommendations for resolution. If the agencies are aware of a dispute, they will defer taking final action, where consistent with applicable legal deadlines, to allow the issue to be resolved through the elevation process.

The time periods specified below are intended to facilitate expeditious resolution of the issues. These time periods should be shortened when necessary for any agency to meet applicable legal deadlines. The time periods begin to run on the date that the elevating agency or agencies notify the next level of the elevation request. All prescribed time frames in the elevation process can be waived by the mutual consent of the participants at any level when the participants believe that progress is being made and that resolution at that level is still possible.

a. *Level 1:* The Level 1 review team consists of staff personnel from EPA and FWS and/or NMFS and field unit line officers or staff supervisors, (*i.e.*, for NMFS, branch/division chiefs; for EPA, branch chiefs; and for FWS, field office supervisors). The overall goal is to design actions to avoid and/or minimize adverse impacts to listed species by jointly working on biological evaluations, concurrences and biological opinions for such actions. General functions include those specified in section V.A.1.

Any contentious issues will be discussed with an attempt to resolve them without elevation. If disputes cannot be resolved among the Level 1 team members, the

issue will be raised with the Level 2 review team as soon as possible.

b. *Level 2:* The Level 2 review team consists of all regional executives (*i.e.*, for NMFS and EPA, regional administrators; and for FWS, regional directors). Their function is to resolve any elevated disputes within 21 days of notification of elevation by Level 1 teams, or sooner as necessary to meet mandatory deadlines, and serve as key advisors on policy and process. The Level 2 team (*i.e.*, the regional executives) may confer with field unit line officers or staff supervisors (*e.g.*, for NMFS, branch/division chiefs; for EPA, branch chiefs; and for FWS, field office supervisors) in making any decisions on the elevation. If issues are not resolved by the Level 2 team, the issue will be elevated for Headquarters Review.

c. *Headquarters Review*: This review consists of the Director of NMFS (Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, NOAA), the Director of FWS, and the Deputy Assistant Administrator of Water at EPA or their representatives. These officials shall attempt to issue a decision resolving the issue within 21 days after elevation. Decisions will be binding upon the agencies' field staffs. Agency administrators or their designees shall make every attempt to resolve the dispute before elevation, where necessary, to the Assistant Secretaries of the Departments of Interior/ Commerce and the Assistant Administrator of EPA. Where determined to be appropriate (*e.g.*, where the results of the elevation would provide useful guidance to agency staff), the decision on the elevation should be memorialized in writing and circulated among Agency staff to serve as guidance for future decisions. Assistant Secretary(s) and Assistant Administrator shall resolve any issues within 21 days of

elevation. The authority to render any decision that is subject to elevation rests with the agency exercising the statutory or regulatory authority in question.

3. Oversight Panel

The Oversight Panel consists of regional and headquarters personnel from each individual agency. The panel provides oversight and coordination for all aspects of this agreement. Its functions include, but are not limited to:

(1) Maintaining and updating process guidance;

(2) Addressing issues about process implementation;

(3) Incorporating/identifying improvements and revisions into the process;

(4) Convening interagency scientific/technical reviews, as appropriate;

(5) Facilitating reaching consensus on particular issues at any level upon requests by personnel at that level;

(6) Reviewing and evaluating, at least on an annual basis, the Agreement and its implementation by the three agencies; and

(7) As soon as is practicable and no later than one year after signature of the MOA, conducting a proactive conservation review pursuant to section 7(a)(1) of the ESA which will address EPA's authorities under the CWA for carrying out programs for the conservation of listed species.

4. Sub-Agreements

Regional and field level Federal sub-agreements further implementing this Agreement may be executed by appropriate EPA/Services programs. Any such sub-agreements which clarify roles, procedures, and responsibilities are encouraged. This includes any efforts to protect species and water quality on a watershed or ecosystem basis. Sub-agreements must be consistent with this Agreement and must be approved by Regional offices and reviewed by Headquarters.

5. Guidance/Training

EPA and the Services will hold joint training sessions with regional and field staff to facilitate staff's understanding and implementation of the Agreement, with a goal of providing such training to all relevant personnel within eighteen months. The agencies may issue guidance individually or jointly to assist in carrying out this Agreement.

B. Summary – Section 7 Consultation Process

1. Scope

The regulations that interpret and implement section 7 of the ESA establish a framework for efficient and consistent consultation between Federal agencies regarding listed species and critical habitat.

2. Data and Information Requirements

EPA agrees to include in any biological assessment or evaluation the best available scientific and commercial information. EPA and the Services will exercise their

scientific judgment to determine the relevance and validity of the available scientific and commercial information. The Level 1 review teams will provide a venue for collaborating among the agencies on these issues.

3. Information Sharing

The Services will initially provide EPA with a consolidated list of Federally-listed and proposed species and designated and proposed critical habitat by State. EPA will send the list of species and habitat to States and Tribes. The Services agree to provide to EPA any additions of species or other relevant information as proposed or final rule-making occurs. EPA will provide and update copies of Federal section 304(a) water quality criteria and applicable State and Tribal water quality standards to the Services.

EPA and the Services will share information and analyses used to make decisions under this Agreement when requested, including analyses supporting biological evaluations and biological opinions. The Services will provide to EPA copies of all draft jeopardy biological opinions and draft no jeopardy biological opinions with incidental take statements, unless EPA specifically requests that a draft not be provided.

4. Effects of an Action

All "effects of the action" and "cumulative effects" will be considered in the Services' biological opinions (50 CFR 402.14(c), 402.14(g) (3) and (4), and 402.14(h)). The "effects of an action" include all direct as well as indirect effects that are reasonably certain to occur, even at a later time. Effects of an action include effects of interrelated and

interdependent actions associated with the proposed action in question. Cumulative effects include future State or Tribal and private actions that are reasonably certain to occur in the action area that do not involve Federal activities. Water quality criteria and State or Tribal water quality standards establish levels of pollutants from all sources, and so would account for all such effects insofar as water quality is concerned. Since NPDES permits are established to achieve water quality standards, they will account for point source effects insofar as water quality is concerned.

5. Biological Evaluation

Although section 7(c) of the ESA refers to a biological assessment as an element of the consultation process, a biological assessment is required only in the case of a major construction activity, as defined at 50 CFR 402.02. The purpose of a biological assessment is to enable an agency to determine whether a proposed action is likely to adversely affect Federally-listed species and designated critical habitat. A biological assessment also assists an agency in complying with potential ESA "conference" requirements for proposed species and critical habitat under 50 CFR 402.10. For EPA actions that are not major construction activities, an alternative document that may be used for decision-making is a biological evaluation. While a biological evaluation is not required by regulation, EPA will develop such an evaluation where the Agency determines it would be appropriate for determining whether listed species may be affected by the proposed action and for assisting consultation with the Services. The Services recognize that the content and format of the biological evaluation are to be determined by EPA. When

preparing biological evaluations, EPA will use as guidance the information requirement described at 50 CFR 402.14(c) (initiation of consultation).

A biological evaluation is an analysis of the potential effects of a proposed action on listed species or their critical habitat based upon the best available scientific or commercial information. The biological evaluation will vary in extent and rigor according to the certainty and severity of an action's deleterious effect. For example, a biological evaluation may be very brief if the expected result of an action is straightforward, is beneficial, or is of little or no consequence. If, on the other hand, the potential effects are severe, large in scope, complex or uncertain in terms of outcome, the analysis would need to be more extensive and rigorous.

A biological evaluation can be used for decision-making prior to and throughout section 7 consultation and for a possible conference on proposed species or critical habitat. The evaluation can be used to make a "may effect" or "no effect" determination, or to support a judgment that the proposed action is or is not likely to adversely affect listed species or their critical habitat.

If early or formal consultation is initiated, a biological evaluation or biological assessment can be used by the appropriate Service in rendering a preliminary or final biological opinion. Therefore, EPA will discuss, as appropriate, the form and nature of the biological evaluation with the Services to ensure that the biological evaluation contains adequate information for evaluating the effects of the proposed action.

6. Timeliness of Actions

In informal and formal consultation, EPA and the Services agree to adhere to time frames set forth in 50 CFR part 402 and supplemental guidance provided in this Agreement, in order to enable EPA to meet statutory and regulatory deadlines under the CWA. EPA will strive to provide advance notice to the Services concerning anticipated consultations, to provide thorough biological evaluations, to comment promptly on draft opinions and to provide, where appropriate, additional available information requested by the Services.

If during informal consultation EPA determines that the action is not likely to adversely affect listed species or critical habitat, then EPA will notify the Services in writing. The Services will respond in writing within 30 days of receipt of such a determination, unless extended by mutual agreement. The response will state whether the Services concur or does [sic] not concur with EPA's determination. If the Services do not concur, it [sic] will provide a written explanation that includes the species and/or habitat of concern, the perceived adverse effects, supporting information, and a basic rationale.

The Services may request that EPA initiate consultation on a Federal action. The Services do not have the authority, however, to require the initiation of consultation. The Services' written explanation of the request shall include the species and/or critical habitat of concern, manner in which there may be an effect, supporting information, and a basic rationale.

The Services will strive to issue biological opinions within 90 days of an initiation of formal consultation

unless the Services and EPA agree to extend the consultation period. The timing of activities during consultation may be further expedited as necessary taking into account legal deadlines for EPA action and the agencies' programmatic needs. EPA, where appropriate, will enter into early consultation with the Services in order to ensure that EPA meets its statutory CWA deadlines for decision-making. In addition, EPA and the Services agree to make every effort to provide prompt and responsive communications to ensure States, Tribes, and permit applicants do not suffer undue procedural delays. Where EPA prepares a biological evaluation, EPA will attempt to provide the Services a biological evaluation at least 90 days before reaching a decision on a proposed action.

7. EPA Responsibility at the Conclusion of Section 7 Consultation

Following issuance of a biological opinion, EPA will determine whether and in what manner to proceed with the action in light of its CWA and section 7 obligations. If a jeopardy opinion is issued, EPA will notify the Services of its final decision on the action.

8. Reinitiation of Formal Consultation

The section 7 regulations define conditions under which EPA or the Services will request reinitiation of formal consultation at 50 CFR 402.16. The Services and EPA will work cooperatively to evaluate any new information to determine if reinitiation is necessary.

C. Proposed Species and Proposed Critical Habitat

The Services will identify proposed species and proposed critical habitat to EPA Regional offices. EPA will evaluate any CWA activities it authorizes, funds, or carries out that are subject to section 7 and determine if they are likely to jeopardize proposed species or result in the destruction or adverse modification of proposed critical habitat. If so, EPA will confer with the Services using the procedures under 50 CFR 402.10. The Services may also initiate a request for conference on a particular action.

D. Recovery Program

Section 7(a)(1) of the ESA provides that Federal agencies shall utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation and recovery of threatened and endangered species. Section 7 consultation and the recovery planning and implementation process are two primary mechanisms that EPA can use as guides to identify actions that EPA or the Services believe are needed to protect and recover Federally-listed species.

1. Conservation Recommendations To Assist Recovery

The section 7(a)(2) consultation process is primarily intended to ensure that EPA's actions are not likely to jeopardize the continued existence of Federally-listed species or adversely modify their critical habitat. However, under the authority provided in section 7(a)(1), biological opinions may contain discretionary conservation recommendations to promote the recovery of the subject species. (50 CFR 402.02 defines conservation recommendations as suggestions of the Services regarding the development of

information or discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans or to develop information.) Implementation of these conservation recommendations would help conserve and recover listed species.

Frequent and informal contact between the Services and EPA is encouraged during all stages in the development of conservation recommendations. During section 7 consultation, the Services will work closely with EPA to identify conservation recommendations and evaluate the feasibility of their implementation.

2. Recovery Planning

Recovery plans are developed in three stages: (a) Technical drafts that are intended to provide agencies an opportunity to assist the Services in developing biologically sound recovery plans; (b) Agency drafts which outline the various tasks the Services feel may be within the jurisdiction of other agencies and are circulated for public comment (the Technical and Agency Draft are sometimes combined into one document to save time); and (c) the final plan.

The Services will invite EPA to serve as members of Recovery Teams where water quality is a concern or EPA has particular expertise, provide to EPA copies of all draft recovery plans that contain water quality related recovery tasks, and actively solicit EPA's involvement during all phases of recovery plan development. The Services will also solicit State or Tribal involvement, where appropriate. EPA will provide the Services with comments related to water quality threats, recovery issues, and will suggest

areas where plans could be modified to include specific actions to support the species recovery effort.

3. Recovery Implementation

EPA and the Services will hold recovery planning/implementation discussions or meetings, on at least an annual basis. The members of this group and the geographic area covered by this group will vary among Regions, depending on the geographic range and number of species impacted by water quality. The meetings could be organized on a watershed or ecosystem basis and involve field and/or Regional personnel. These groups will discuss current and upcoming water quality/listed species related activities, and provide input for prioritizing watersheds (e.g., the number of listed species, the seriousness of threats, and the opportunities for conservation/recovery success) for potential future coordinated activities.

E. Candidate Conservation Activities

The Services and EPA will develop watershed and ecosystem based initiatives to identify and remove those conditions that may lead to future listings. Efforts should focus on candidate species and other species of concern and their associated ecosystems. The local/regional coordinating teams will identify specific focus areas.

VI. National Level Activities To Ensure Protection of Species

EPA will take the following steps at the national level to ensure that State and Tribal water quality standards provide protection for endangered and threatened species.

A. National Rulemaking

EPA will propose amendments to its national water quality standards regulations (40 CFR part 131) to include provisions to ensure the protection of endangered and threatened species within 24 months following the execution of this Agreement. EPA will propose to require that water quality not be likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of designated critical habitat, and to provide that mixing zones shall be not likely to cause jeopardy, including a prohibition of mixing zones or variances that would be likely to cause jeopardy, and a requirement that States or Tribes adopt site-specific water quality criteria (tailored to the geographic range of the species of concern) where determined to be necessary to avoid a likelihood of jeopardy.

After consideration of public comment, EPA will adopt appropriate provisions in a final regulation.

B. Development of New Water Quality Criteria Methodological Guidelines

EPA will continue to invite the Services to be represented on EPA's Aquatic Life Criteria Guidelines Committee. EPA has charged this committee with revising and updating EPA's methodological guidelines for issuance of new 304(a) water quality criteria guidance values. As members of the committee, the Services and EPA will ensure that these methodological guidelines take into account the need to protect Federally-listed species. The Services will assist EPA to (1) develop and have peer reviewed a list of surrogate and target endangered and threatened species that could be used in pollutant toxicity

testing and (2) assist in the development of biocriteria for streams, rivers, lakes, wetlands, estuaries or marine waters that contain endangered and threatened species or designated critical habitat.

These methodological guidelines are subject to peer review, public notice and comment prior to being finalized. Prior to the public comment period, the Directors will provide the Services' views regarding the guidelines so that the public will have the benefit of the Services' views during the comment period. The Services will also be invited to participate in the peer review process for the development of new criteria values under section 304(a), and will designate technical experts to provide the Services' views during the peer review process.

C. National Consultation on CWA Section 304(a) Aquatic Life Criteria

1. Overview

Under section 304(a) of the CWA, EPA from time to time publishes water quality criteria that serve as scientific guidance to be used by States or Tribes in establishing and revising water quality standards. These criteria are not enforceable requirements, but are recommended criteria levels that States or Tribes may adopt as part of their legally enforceable water quality standards. States or Tribes may, however, adopt other scientifically defensible criteria in lieu of EPA's recommended criteria (see 40 CFR 131.11(b)). EPA has to date published criteria for the protection of aquatic life for 45 pollutants. EPA has developed an interim-final "Water Quality Criteria and Standards Plan" (EPA, June 1998) to guide the development

and implementation of new or modified 304(a) criteria in the coming years.

The objective of EPA's criteria program is to provide scientific information to States and Tribes that will best facilitate the overall protection of the aquatic ecosystem. A better understanding of the effects of water pollution on endangered and threatened species will help achieve this objective. Therefore, EPA and the Services will conduct a section 7 consultation on the aquatic life criteria to assess the effect of the criteria on listed species and designated critical habitat. EPA and the Services will also conduct a conference regarding species proposed for listing and proposed designated critical habitat. EPA will consider the results of this consultation as it implements and refines its criteria program, including decisions regarding the relative priorities of revising existing criteria and developing new criteria.

EPA and the Services have gained considerable experience in evaluating the potential effects on endangered and threatened species of pollutants for which EPA has published recommended aquatic life criteria under section 304(a) of the CWA. For example, the Services have issued biological opinions as a result of section 7 consultations on aquatic life criteria approved by EPA in water quality standards adopted by the States of New Jersey, Alabama, and Arizona, and promulgated by EPA for the Great Lakes Basin. EPA also conducted consultation with the Services regarding aquatic life criteria promulgated by EPA for toxic pollutants for certain waters in California. In addition to these comprehensive formal consultations, EPA and the Services have also conducted informal consultations on State water quality standards approval actions

which have covered water quality criteria contained in the standards.

EPA and the Services recognize, however, that conducting consultations on a State-by-State basis is not the most efficient approach to evaluating the effects of water pollution on endangered and threatened species throughout the country. National 304(a) consultations will ensure a consistent approach to evaluating the effects of pollutants on species and identifying measures that may be needed to better protect them. National consultations will also ensure better consideration of effects on species whose ranges cross State boundaries.

2. Procedures for Consultations

The consultations will be conducted in accordance with the procedures in 50 CFR part 402 and the guidance contained in the Services' Consultation Handbook. EPA and the Services also anticipate that the consultations will follow the basic approach described below. The agencies will endeavor to streamline their processes to complete these consultations in an expedited manner.

EPA and the Services anticipate that the national consultations will focus on aquatic and aquatic-dependent species. The consultations will be conducted on a national basis, and therefore, will not be waterbody-specific. In addition, given the numbers of species involved in the consultations, the effects on species will be evaluated to the maximum extent possible based on groupings of species believed to be affected in a similar manner.

The agencies will take a collaborative approach to evaluating the effects of the criteria pollutants on listed

species, and joint teams will be established to conduct the consultations. With input from the Services, EPA will prepare a biological evaluation based on the best scientific and commercial data available, and will provide a rationale for any findings regarding the effects of the criteria pollutants on listed species. EPA will make "effects determinations" based on the direct and indirect effects of the 45 pollutants on listed species. EPA will evaluate the effects of pollutants on species in the water column based upon the available toxicological data, principally the data assembled in EPA's criteria development documents as well any more recent toxicological information. EPA will consider other exposure scenarios to aquatic and aquatic-dependent species and provide available information to the Services.

The Services will work collaboratively with EPA in developing their biological opinion, including the development of any reasonable and prudent measures or alternatives to minimize incidental take, if anticipated, or to avoid likely jeopardy to listed species or adverse modification or destruction of designated critical habitat. Any reasonable and prudent measures or alternatives that identify research needs will be mutually developed and will reflect priorities established by the national research and data gathering plan. Should the opinion call for revisions to existing criteria or issuance of new criteria, the opinion will recognize EPA's practice of subjecting new or revised criteria to public notice and comment and external peer review prior to being finalized. EPA believes that the existing criteria provide a significant degree of protection for the aquatic ecosystem (including listed species). The agencies agree that, until any revisions of criteria are completed, the agencies will, to the maximum extent

practicable, maintain the status quo by continuing to implement such criteria in water quality standards programs prior to revisions to the criteria.

Because the effects of the criteria pollutants on certain listed species have already been evaluated in biological opinions issued by the Services, the agencies will rely upon the scientific information and conclusions in those consultations to the maximum extent possible. Such prior opinions will remain in effect unless consultation is reinitiated.

The national consultation will provide section 7 coverage for any water quality criteria included in State or Tribal water quality standards approved, or Federal water quality standards promulgated, by EPA that are identical to or more stringent than the recommended section 304(a) criteria. Therefore, separate consultation on such criteria will not be necessary, subject to requirements related to reinitiation of consultation under 50 CFR 402.16. If, during the national consultation, EPA proposes to take an action approving or promulgating numeric standards that are identical to or more stringent than the existing 304(a) criteria, such action will be covered by the national consultation. EPA and the Services agree that EPA may proceed with its action pending the conclusion of the national consultation. EPA will ensure that its action does not have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives in the national consultation by stating that EPA's action is subject to revision based on the results of the consultation.

VII. Joint National Research and Data Gathering Plan and Priorities

EPA and the Services will convene a work group of scientific and technical personnel to develop a research and data gathering plan that supports water quality standards protective of species of concern and the ecosystems they inhabit. The goal of the plan is to identify high priority data and information needed to reduce uncertainty concerning the degree to which water quality criteria and permits are protective of endangered or threatened species. The plan also recognizes the agencies' joint interest in, and responsibility for, funding and conducting research related to endangered and threatened species. The information gathered as a result of this joint plan and the national criteria consultations will be used by EPA in the revision or development of national 304(a) water quality criteria, in review of State and Tribal water quality standards, and the evaluation of permits. Similarly, the Services will use this information in assessing threats and minimizing adverse effects to listed species. The agencies agree that the plan should be completed, if possible, within eighteen months of the signing of this Agreement.

The work group will primarily be concerned with three tasks: (1) Development of the research plan, including the components identified below; (2) evaluating and prioritizing research or data gathering needs identified in consultations on EPA's review of specific State and Tribal water quality standards; and (3) overseeing and coordinating the implementation of the national research/data gathering plan.

A. Existing and New Water Quality Criteria

The national research work group will identify those CWA section 304(a) aquatic life criteria that are the highest priority candidates for additional research based on issues identified in consultations on State and Tribal water quality standards and the national consultations on the aquatic life criteria published by EPA.

The work group will also identify the highest priority areas for the development of new national 304(a) water quality criteria to protect listed species. The work group will take into account new criteria development needs identified in consultations on State and Tribal water quality standards including, in particular, the priority to be given to the development of wildlife criteria for areas where such criteria have not been developed (i.e., outside the Great Lakes Basin).

B. Work Group Report to Agreement Signatories

Within one year of signing this Agreement, the work group will submit a comprehensive report to the signatories of this Agreement (or their successors) that (1) summarizes the range of research options considered by the work group; (2) makes recommendations regarding priority research and data gathering undertakings for existing and new water quality criteria; (3) describes the recommended additional research; (4) estimates the likely cost of the research; (5) evaluates available funding for completing the research; and (6) establishes a specific time frame for completing the research and data gathering.

C. National Research and Data Gathering Plan

After taking into account the recommendations of the work group, the signatories of this Agreement (or their successors) will adopt a national research and data gathering plan within eighteen months of the signing of this Agreement. The plan will identify near-term (1-5 years) priorities reflecting the highest priorities identified by the agencies that can be accomplished with available and anticipated funding sources. The plan will also identify longer term (5-10 years) priorities. The agencies will work to incorporate the plan into their respective budgets, and to achieve economies of scale and increased effectiveness in the use of limited funds by coordinating efforts wherever possible. The agencies will also work to coordinate the plan with other Federal agencies as appropriate.

D. Consultation on State and Tribal Water Quality Standards

On an ongoing basis, the work group will provide expertise and assistance to the field/regional offices regarding research/data gathering issues raised in consultations on State and Tribal water quality standards. Where such consultations identify significant research/data gathering priorities, those priorities will be forwarded for evaluation by the work group. With input from the regional/field offices, the work group will determine the priority of such research and data gathering in relation to other needs contained in the national plan. This process will enable the agencies to rationally allocate their resources as new research/data gathering needs arise.

VIII. Consultation on Water Quality Standards Actions

A. *Development of New or Revised State or Tribal Water Quality Standards*

EPA will communicate and, where required under section 7 of the ESA, consult with the Services on new or revised State or Tribal water quality standards and implementing procedures that are subject to EPA review and approval under section 303(c) of the CWA.

If a State or Tribe requests, or upon mutual agreement, EPA may, by notifying the appropriate Service(s) in writing, designate a State or Tribe to serve as a non-Federal representative to conduct informal consultation in accordance with 50 CFR 402.08.

1. Scoping of Issues To Be Considered During the Triennial Review Process

Section 303(c) of the CWA requires States to adopt and revise standards at least on a triennial basis. The Services and EPA recognize that to accomplish timely implementation of standards that may affect Federally-listed species and designated critical habitat, early involvement and technical assistance by the Services is needed. In an effort to facilitate collaboration and the consultation process, EPA regional offices will provide the Services annually with a list of all upcoming scheduled triennial reviews for the next 5-year period.

The Services will participate in a meeting with EPA and the State or Tribe to discuss the extent of an upcoming review. EPA will take the lead to schedule the meeting near the start of the triennial review process.

2. Development of State or Tribal Standards

EPA will seek the technical assistance and comments of the Services during a State's or Tribe's development of water quality standards and related policies. The Services will provide the States or Tribes and EPA with information on Federally-listed species, proposed species and proposed critical habitat, and designated critical habitat in the State or on Tribal lands. EPA will provide assistance to the Services in obtaining descriptions of pollutants and causes of water quality problems within a watershed or ecosystem. The Services will work cooperatively with the States or Tribes to identify any concerns the Services may have and how to address those concerns. EPA will request the Services to review and comment on draft standards, and to participate in meetings with States or Tribes as appropriate. EPA will indicate which of these requests are of high priority, and the Services will make every effort to be responsive to these requests.

Where appropriate, EPA and the Services will encourage the State or Tribe to adopt special protective designations where listed or proposed threatened or endangered species are present or critical habitat is designated or proposed.

EPA will initiate discussions with the Services if there is a concern that a draft State or Tribal standard or relevant policy may impact Federally-listed species or critical habitat.

3. Adoption and Submittal of State or Tribal Standards

States or Tribes adopt new and revised standards and implementing policies from time to time as well as at the conclusion of the triennial review period.

After the final action adopting the standards, the State or Tribe sends its adopted standards to EPA. Once received, EPA is required by the CWA to approve the standards within 60 days or disapprove them within 90 days. Section 7 consultation is required if EPA determines that its approval of any of the standards may affect listed species or designated critical habitat. The time periods established by the CWA require that EPA and the Services work effectively together to complete any needed consultation on a State's or Tribe's standards quickly. In order to provide enough time for consultation with the Services where the approval may affect endangered or threatened species, EPA will work with the State or Tribe with the goal of providing to the Services a final draft of the new or revised water quality standards 90 days prior to the State's or Tribe's expected submission of the standards to EPA. The Services and EPA agree to consult on the final draft, and to accommodate minor revisions in the standards that may occur during the State's or Tribe's adoption process.

4. EPA Develops Biological Evaluation

When needed, EPA will develop a biological evaluation to analyze the potential effect of any new or revised State or Tribe adopted standards that may affect Federally-listed species or critical habitat.

5. EPA Determination of "No Effect," "May Affect," and "Likely To Adversely Affect"

EPA will evaluate proposed new or revised standards and use any biological evaluation or other information to determine if the new or revised standards "may affect" a

listed species or critical habitat. For those standards where EPA determines that there is "no effect," EPA may record the determination for its files and no consultation is required. Although not required by section 7 of the ESA for actions that are not major construction activities as defined by 50 CFR 402.02, EPA will share any biological evaluation, "no effect" determination, and supporting documentation used to make a "no effect" determination with the Services upon request.

If EPA decides that the new or revised water quality standards "may affect" a listed species, then EPA will enter into informal consultation (unless EPA decides to proceed directly to formal consultation) to determine whether the standards are likely to adversely affect Federally-listed species or critical habitat. If EPA determines that the species or critical habitat is not likely to be adversely affected, EPA will request the Service to concur with its finding.

Where EPA finds that a species or critical habitat is likely to be adversely affected, EPA will consider, and the Services may suggest, modifications to the standards(s) [sic] or other appropriate actions which would avoid the likelihood of adverse effects to listed species or critical habitat. If the likelihood of adverse effects cannot be avoided during informal consultation, then EPA will initiate formal consultation with the Services or EPA may choose to disapprove the standard. In addition, if EPA finds that a proposed species is likely to be jeopardized or proposed critical habitat destroyed or adversely modified by EPA approval of a new or revised State or Tribal standard, EPA will confer with the Services under 50 CFR 402.10.

6. Services' Review of "Not Likely To Adversely Affect" Determination

Within 30 days after EPA submits a "not likely to adversely affect" determination, the Services will provide EPA with a written response on whether they concur with EPA's findings. The Services will provide EPA with one of the three following types of written responses: (1) Concurrence with EPA's determination (this would conclude consultation), (2) non-concurrence with EPA's determination and, if the Services cannot identify the specific ways to avoid adverse effects, a request that EPA enter into formal section 7 consultation (see 7 below), or (3) a request that EPA provide further information on their determination. If it is not practicable for EPA to provide further information, the Services will make a decision based on the best available scientific and commercial information.

7. Formal Consultation

Where EPA intends to request formal consultation, EPA will attempt to do so at least 45 days prior to the State's or Tribe's expected submission of water quality standards to EPA. Formal consultation on new or revised standards adopted by a State or Tribe will begin on the date the Services and EPA jointly agree that the information provided is sufficient to initiate consultation under 50 CFR 402.14(c). The consultation will be based on the information supplied by EPA in any biological evaluation and other relevant information that is available or which can practicably be obtained during the consultation period (see 50 CFR 402.14 (d) and (f)). The Services will make every effort to complete consultation and delivery of a final biological opinion within 90 days, or on a schedule agreed upon with the EPA Regional Office.

If the Service anticipates that incidental take will occur, the Service's biological opinion will provide an incidental take statement that will normally contain reasonable and prudent measures to minimize such take, and terms and conditions to implement those measures. Reasonable and prudent measures can include actions that involve only minor changes to the proposed action, and reduce the level of take associated with project activities. These measures should minimize the impacts of incidental take to the extent reasonable and prudent. Measures are considered reasonable and prudent when they are consistent with the proposed action's basic design, location, scope, duration, and timing. The test for reasonableness is whether the proposed measure would cause more than a minor change to the proposed action. 50 CFR 402.14(i)(2).

Appropriate minor changes can include, for example, a condition stating that the EPA Regional Office will work with the State or Tribe to obtain revisions to the water quality standards in the next triennial review. Where either of the Services believe that there is a need for the standards to be revised more quickly, the Service should work with EPA and the State or Tribe to determine whether any revisions could be developed more quickly than the next anticipated triennial review. Because reasonable and prudent measures should not exceed the scope of EPA actions, reasonable and prudent measures in a water quality standards consultation should not impose requirements on other CWA programs unless agreed to by both EPA and the Services.

The Services may include research or data gathering undertakings as conditions of an incidental take statement contained in a biological opinion where it determines that

the way to minimize future incidental take is through research and data gathering. However, to the maximum extent possible, the Services will work with EPA to identify research needs that will be addressed in the National Research and Data Gathering Plan. The Plan identifies high priority data and information needed to reduce the uncertainty inherent in the degree to which water quality criteria would protect listed species. Research and data identified in the Plan has the goal of minimizing any incidental take associated with water quality standards.

Where site specific research or data are needed that are not addressed in the Plan, the biological opinion will explain how the research or data gathering will minimize such take while not altering the basic design, location, scope, duration, or timing of the action.

Where a regional EPA office finds that it is not practicable to complete the research or data gathering requested in the draft opinion, but the Services believe that inclusion of the research condition is important to minimizing incidental take, the Services may elevate the issue in accordance with the procedures in section V.A. of this Agreement. During the elevation process, the agencies will evaluate the need for the research identified by the Service in the water quality standards consultation in light of available resources and the Plan.

Reasonable and prudent measures and terms and conditions should be developed in close coordination with the EPA and the State or Tribe, to ensure that the measures are reasonable, that they cause only minor changes to the proposed action, and that they are within the legal authority and jurisdiction of the Agency to carry out. If the Services, EPA, and the States or Tribe cannot reach

agreement on appropriate reasonable and prudent measures or terms and conditions at the level the consultation is being conducted, the decision can be elevated by the procedures discussed in section V.A.

As a general matter, EPA disapproval of a State or Tribal water quality standard is not a minor undertaking because it triggers a legal duty on the part of EPA to initiate promptly Federal rule-making unless the State or Tribe revises the standard within 90 days (see CWA 303(c)(3) and (4)). Where the Services and EPA agree, however, disapproval of a State or Tribal water quality standard may be included as a reasonable and prudent measure in an incidental take statement.

The Services will issue a biological opinion that concludes whether any Federally-listed species are likely to be jeopardized or critical habitat adversely modified or destroyed by the State or Tribe's new or revised water quality standards. If either of the Services makes a jeopardy or adverse modification finding, it will identify any available reasonable and prudent alternatives, which may include, but are not limited to, those specified below. EPA will notify the Services of its final decision on the action.

Some possible ideas for development of specific reasonable and prudent alternatives are:

a. EPA coordinates with the State or Tribe to adopt (or revise) water quality standards necessary to remove the jeopardy situation.

b. EPA disapproves relevant portions of the State or Tribe's adopted standards (see 40 CFR 131.21) and initiates promulgation of Federal standards for the relevant

water body (see 40 CFR 131.22). Where appropriate, EPA would promulgate such standards on an expedited basis.

c. Using its authority under section 303(c)(4)(B) of the CWA, EPA promulgates Federal standards as necessary.

8. EPA Action on State or Tribal Standards

After reviewing the biological opinion, EPA will inform the Services of its intended action.

B. Existing Water Quality Standards

If the Services present information to EPA, or EPA otherwise has information supporting a determination that existing State or Tribal water quality standards are not adequate to avoid jeopardizing endangered or threatened Federally-listed species or adversely modifying critical habitat or for protecting and propagating fish, shellfish and wildlife, EPA will work with the State or Tribe in the context of its triennial review process to obtain revisions in the State or Tribal standards. Such revisions could include, where appropriate, adoption of site-specific water quality standards tailored to the geographic range of the species of concern. If a State or Tribe does not make such revisions, the EPA regional office will recommend to the EPA Administrator that a finding be made under section 303(c)(4)(B) of the CWA that the revisions are necessary.

EPA will engage in section 7 consultation to ensure that any revisions to the existing standards are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse

modification of designated critical habitat and to minimize any anticipated incidental take. If EPA and the Services disagree regarding the need for revisions in the State or Tribal standards, the issue may be elevated. Consultation will be consistent with the provisions of 50 CFR part 402 and part A above.

C. Consultation on EPA Promulgation of State or Tribal Water Quality Standards

EPA promulgation of State or Tribal water quality standards is a Federal rule-making process and EPA will comply with the consultation requirements of section 7 of the ESA with any promulgation.

IX. Permitting Program Activities

This Agreement establishes a framework for coordinating actions by EPA and the Services for activities under the CWA section 402. These activities are: (1) EPA review of permits issued by States or Tribes with approved permitting programs, and (2) EPA issuance of permits under section 402 of the CWA.

A. Coordination Procedures Regarding Issuance of State or Tribal Permits

EPA has authority and responsibility for overseeing the operation of State/Tribal NPDES programs through, among other means, review of State/Tribal NPDES permits where appropriate. EPA's oversight includes consideration of the impact of permitted discharges on waters and species that depend on those waters. EPA does this by among other things, determining whether State or Tribal

permits indeed attain water quality standards. The procedures outlined below are designed to assist EPA in fulfilling these CWA oversight responsibilities.

EPA and the Services agree to follow the coordination procedures below with regard to EPA review of State or Tribal permits in all existing and new permitting programs approved by EPA under section 402 of the CWA. Procedures and time lines for EPA review and objection to State or Tribal permits are established by statute and regulation. See CWA section 402(d); 40 CFR 123.44. Where EPA determines that exercise of its objection authority is appropriate to protect endangered and threatened species, the Agency will act pursuant to its existing authorities under the CWA (i.e., where the proposed permit would be "outside the guidelines and requirements" of the CWA. See CWA 402(d)(2)). EPA and the Services will follow the coordination procedures below in a manner consistent with these statutory and regulatory procedures:

1. The Services will provide the States or Tribes with information on Federally-listed species and any designated critical habitat in the States or on Tribal lands, with special emphasis on aquatic and aquatic-dependent species.

2. States are obligated under existing CWA regulations to provide notice and copies of draft permits to the Services. See 40 CFR 124.10(c)(1)(iv) and (e). EPA will exercise its oversight authority to ensure that States and Tribes carry out this obligation. EPA and the Services will work with States and Tribes to share information on permits that may raise issues regarding impacts to threatened or endangered species or designated critical habitat.

3. If the Services or EPA are concerned that an NPDES permit is likely to have a more than minor detrimental effect on a Federally-listed species or critical habitat, the Service or EPA will contact the appropriate State or Tribal agency (preferably within 10 days of receipt of a notice of a draft State or Tribal permit) to discuss identified concerns. The Services or EPA will provide appropriate information in support of identified concerns. The Services and EPA will provide copies to each other of comments made to States or Tribes on issues related to Federally-listed species.

4. If unable to resolve identified issue(s) with the State or Tribe, the Services will contact the appropriate EPA Regional Branch not later than five working days prior to the close of the public comment period on the State's or Tribe's draft NPDES permit. Telephone contacts should be followed by written documentation of the discussion with EPA and include or reference any relevant supporting information.

5. If contacted by the Services, EPA will coordinate with the Services and the State or Tribe to ensure that the permit will comply with all applicable CWA requirements, including State or Tribal water quality standards, which include narrative criteria prohibiting toxic discharges, and will discuss appropriate measures protective of Federally-listed species and critical habitat.

6. EPA may make a formal objection, where consistent with its CWA authority, or take other appropriate action, where EPA finds that a State or Tribal NPDES permit will likely have more than minor detrimental effect on Federally-listed species or critical habitat.

For those NPDES permits with detrimental effects on Federally-listed species or critical habitat that are minor, it is the intention of the Services and EPA that the Services will work with the State or Tribe to reduce the detrimental effects stemming from the permit. For those NPDES permits that have detrimental effects on Federally-listed species or critical habitat that are more than minor, including circumstances where the discharge fails to ensure the protection and propagation of fish, shellfish and wildlife, and where the State or Tribe and the Services are unable to resolve the issues, it is the intention of the Services and EPA that EPA would work with the State or Tribe to remove or reduce the detrimental impacts of the permit, including, in appropriate cases, by objecting to and Federalizing the permit where consistent with EPA's CWA authority.

EPA will use the full extent of its CWA authority to object to a State or Tribal permit where EPA finds (taking into account all available information, including any analysis conducted by the Services) that a State or Tribal permit is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.

Note: EPA may review or waive review of draft State or Tribal NPDES permits (40 CFR 123.24(d)). EPA will work with the Services through the local/regional coordinating teams to help determine which categories of permits should be reviewed for endangered species concerns. If EPA finds that a draft permit has a reasonable potential to have more than a minor detrimental effect on listed species or critical habitat, and review of a draft permit has been waived, EPA will withdraw this waiver during the public comment period (see 40 CFR 123.24(e)(1)).

7. If EPA objects to a NPDES permit under paragraph 6 above, EPA will follow the permit objection procedures outlined in 40 CFR 123.44 and coordinate with the Services in seeking to have the State or Tribe revise its permit. A State or Tribe may not issue a permit over an outstanding EPA objection. If EPA assumes permit issuing authority for a NPDES permit, EPA will consult with the Service prior to issuance of the permit (as a Federal action) as appropriate under section 7 of the ESA.

8. In the case of State or Tribal permits that have already been issued, if the Services identify a permitted action which is likely to have a more than minor detrimental effect on Federally-listed species or critical habitat, then the Services will contact the State or Tribe to seek to remedy the situation. EPA will provide support and assistance to the Services in working with the State or Tribe. Although EPA may, at the time of permit issuance, object to and assume permit-issuing authority for draft NPDES permits, EPA has no authority to require changes to an already-issued State or Tribal permit. EPA or the Services could request that the State or Tribe use State or Tribal authority to reopen an issued permit if it is likely to have more than minor detrimental effects [sic] Federally-listed species or critical habitat.

9. EPA will encourage the State or Tribe to facilitate the involvement of permittees or permit applicants in this process.

B. Issuance of EPA Permits

EPA issuance of a permit is an action subject to section 7 consultation if it may affect listed species or critical habitat. EPA will meet ESA requirements as

provided in 40 CFR 122.49(c) and 50 CFR part 402 on the issuance of individual and general NPDES permits. If consultation has been completed on State or Tribal water quality standards and the NPDES permit conforms with those standards, then any ESA section 7 review process should be simplified.

EPA will assure that all permits ensure the attainment and maintenance of State or Tribal water quality standards, including those that have been the subject of consultation or have been determined to have "no effect" on listed species and critical habitat.

EPA and the Services agree to coordinate as follows in the review of EPA-issued permits.

1. The Services will provide to EPA, when requested, information regarding the presence of Federally-listed species, critical habitat, proposed species and proposed critical habitat, including species lists, maps, and other relevant information.

2. EPA will review permit applications and other available information (including that previously provided by the Services) to determine if issuance of a permit may affect any Federally-listed species or critical habitat. If EPA makes a "no effect" finding, EPA will document this determination in the permit record before public notice. During the 30-day public comment period, the Services may submit comments on EPA's determination. The Services may request initiation of consultation on Federally-listed species or critical habitat or conference on proposed species if it believes the proposed action may affect listed species or is likely to jeopardize the continued existence of a species proposed for listing or result in the

destruction or adverse modification of proposed designated critical habitat.

3. If EPA determines that the permitted action may affect Federally-listed species or critical habitat, EPA will initiate either informal or formal consultation. If EPA determines that the permitted action is likely to jeopardize proposed species or adversely modify proposed critical habitat, a conference will be initiated.

4. In consultations involving permits, any reasonable and prudent measures (associated with an incidental take statement) will specify the measures considered necessary or appropriate to minimize takings. The Services will describe such measures. EPA may delegate the terms and conditions of the incidental take statement to permittees. The Services will rely on EPA to retain the responsibility to ensure the terms and conditions are carried out. This approach will be reflected in the Services' incidental take statements. Monitoring reports to ensure implementation of reasonable and prudent measures and terms and conditions will be made available to the Services by EPA in accordance with the terms of the incidental take statement.

Reasonable and prudent measures and terms and conditions should be developed in close coordination with the EPA to ensure that the measures are reasonable, that they cause only minor changes to the proposed action, and that they are within the legal authority and jurisdiction of the Agency to carry out. If the Services and EPA cannot reach agreement on appropriate reasonable and prudent measures or terms and conditions at the level the consultation is being conducted, the decision can be elevated by the procedures discussed in section V.A.

5. EPA will facilitate the involvement of permittees or permit applicants in this process.

C. Watershed Planning

Whenever feasible and appropriate, the Services will participate early on in watershed planning processes. The active participation of the Services as a core stakeholder in the development of watershed or basin plans should reduce or eliminate the need for, or facilitate, consultation on EPA-issued permits and coordination on individual State or Tribal NPDES permits and other site-specific actions that are contemplated in watershed plans. Such participation should save the States, Tribes, EPA and Services time and resources while improving protection and recovery efforts for both listed and unlisted species.

X. Support in Administrative and Judicial Proceedings

The Services agree to provide support when requested by EPA in defense of any requirements or actions adopted by EPA as a consequence of reasonable and prudent alternatives, measures or conservation recommendations rendered in biological opinions, or reasonable and prudent measures provided in incidental take statements. Such support in administrative and judicial proceedings will be subject to approval by the Department of the Interior's Office of the Solicitor or NOAA General Counsel's Office and EPA's General Counsel's Office.

XI. Revisions to Agreement

EPA and the Services may jointly revise this document.

XII. Reservation of Agency Positions

No party to this Agreement waives any administrative claims, positions, or interpretations it may have with respect to the applicability or the enforceability of the ESA or the CWA.

XIII. Obligation of Funds, Commitment of Resources

Nothing in this Agreement shall be construed as obligating any of the parties to the expenditure of funds in excess of appropriations authorized by law or otherwise commit any of the agencies to actions for which it lacks statutory authority. It is understood that the level of resources to be expended under this Agreement will be consistent with the level of resources available to the agencies to support such efforts.

XIV. Nature of Agreement

This memorandum is intended only to improve the internal management of EPA and the Services and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

XV. Effective Date; Termination

This memorandum will become effective upon signature by each of the parties hereto. Any of the parties may withdraw from this Agreement upon 60 days written notice to the other parties; provided that any section 7 consultation covered by the terms of this Agreement that is pending at the time notice of withdrawal is identified by the parties, and those activities covered by this Agreement that begin the consultation process prior to and within the 60-day notice period, will continue to be covered by the terms of this Agreement.

XVI. Signatures

Dated: January 10, 2001.

J. Charles Fox,
Assistant Administrator for Water, U.S. Environmental Protection Agency.

Dated: January 17, 2001.

Jamie Rappaport Clark,
Director, U.S. Fish and Wildlife Service.

Dated: January 18, 2001.

Penelope D. Dalton,
Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.